TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 53.

C. M. PENDLETON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED JANUARY 18, 1908.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 245.

C. M. PENDLETON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 The United States of America. Philippine Islands.

THE UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

In the Court of First Instance of the province of Cebu, Philippine Islands, 11th Judicial District, December 2, 1905.

The fiscal (provincial prosecuting attorney) of the province of Cebu, amending the preceding complaint, charges C. M. Pendleton with the crime of assassination, committed as follows:

That at or about 2.00 a. m. yesterday, Dec. 1, 1905, within the municipal limits of the municipality of Cebu, of this province and judicial district, said C. M. Pendleton, without any just motive, but, on the contrary, maliciously, feloniously, and treacherously; and taking advantage of his position as *as* a public official, to wit, a lieutenant of constabulary of province of Cebu, killed one Leoncio Unabia, a municipal policeman, by a shot from a gun, having committed the act with the aid of armed men, to wit, four constabulary soldiers armed with guns, in violation of law.

SERGIO OS. SERGIO OSMEÑA,
Provincial Fiscal of Cebu.

Witness:
MARCOS GIMNASI.

2 United States of America, Philippine Islands, Eleventh Judicial District.

To Major Harvey P. Neville or any officer of the law, greeting:

By these presents you are hereby ordered to apprehend C. M. Pendleton, charged before me with the crime of assassination and to bring him before this court as soon as possible in order that justice ma*ke* takes its course.

Cebu, December 1st, 1905.

(Signed) ADOLPH WISLIZENUS,
Judge of the 11th Judicial District.

CEBU, *December 2nd, 1905.*

The deputy sheriff of the province of Cebu delivers to the judge of the Court of First Instance the person of C. M. Pendleton, charged with assassination, in compliance with the preceding order.

Very respectfully,

(Illegible),
Deputy Sheriff.

(On the reverse side the following indorsement appears:) Cebu, P. I., December 2nd, 1905. Returned executed. (Signed) R. D. Duckworth-Ford, Lieut. Insp. P. C.

3 United States of America, Philippine Islands. In the Court of First Instance of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

ORDER.

The above-entitled cause was called in this court December 2, 1905, the accused being present and the United States being represented by the fiscal.

The court ordered that the complaint be read to the defendant in order that he might be informed of the same.

The court at once informed the accused that he had the right to be defended by counsel, either appointed by him or appointed de oficio by the court. To which the accused answered stating that he requested until the sixth of December to decide what he should do in the case; and the fiscal having stated that he had no objection to granting the time asked by the defendant, the court ordered that the defendant should be given until December 6th, 1905, to appear in court with counsel of his selection, provided that in case he did not secure counsel the court would appoint counsel de oficio for the defendant.

The court orders that until new order be issued the accused shall be detained under arrest in the provincial jail of this province.

Cebu, Cebu, P. I., December 2, 1905.

(Signed) ADOLPH WISLIZENUS,
Judge 11th District.

4 The United States of America, Philippine Islands. In the Court of First Instance of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

The above-entitled cause was called in this court December 6th, 1905; the accused being present and represented by his counsel, John W. Sleeper, appointed by said defendant, and the United States being represented by the fiscal.

The court at once ordered that the complaint be formally read to the accused. The complaint having been read to the accused in Spanish and also in English, the language of the defendant, he stated that he understood the same, and Mr. Sleeper, counsel for the defendant, prayed the court that he be granted until December 11th, 1905, to examine the complaint and answer the same, and the fiscal having stated that he had no objection to the petition of the counsel

for the defendant, the court ordered that the hearing of this cause be adjourned until nine a. m. December 11th, 1905.

Cebu, Cebu, P. I., December 6th, 1905.

(Signed) ADOLPH WISLEZENUS,
Judge of the 11th District.

5 The United States of America, Philippine Islands, Province of Cebu. In the Court of First Instance of the Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

The defendant prays the court that before answering the complaint he be furnished with a list of the witnesses for the prosecution, according to section 18 of General Order 58; and that a day be set for filing the answer, which shall not be less than one day after the delivery of said list to the defendant.

Cebu, Cebu, December 11th, 1905.

(Signed) JOHN W. SLEEPER,
Counsel for the Defendant.

6 The United States of America, Philippine Islands, Province of Cebu. In the Court of First Instance of the Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

C. M. Pendleton, being duly sworn, states:

That he is the defendant in the above-entitled cause and makes this statement in support of his petition for a list of the witnesses for the prosecution; that he has good reason to believe and does believe that many witnesses were examined by the fiscal who will testify in the hearing of the cause, while only one witness was named in the copy of the complaint delivered to the defendant.

That he knows that said person was examined by the fiscal and believes that there are many other witnesses also.

(Signed) C. M. PENDLETON.

Subscribed and sworn to before me this 11th day of December, 1905.

(Signed) ADOLPH WISLEZENUS,
Judge of the 11th Judicial District.

7 The United States of America, Philippine Islands. Court of First Instance of the province of Cebu.

UNITED STATES *vs.* C. M. PENDLETON. } Assassination.

The above-entitled cause was called December 11th, 1905, and the defendant appeared with his counsel, Mr. John W. Sleeper, and the fiscal appeared for the United States.

Mr. Sleeper prayed the court that the defendant be granted until 9 a. m., December 13th, 1905, to answer the complaint read in this court to said defendant; and the fiscal having stated that he had no objection to fixing 9 a. m., December 13, 1905, for the continuation of this cause.

Then Mr. Sleeper presented a written motion to the court, accompanied by an affidavit of the defendant, praying that before answering the complaint a list of the witnesses of the prosecution be delivered him in accordance with the provisions of section 18 of General Order No. 58; and that on its delivery a day be set for filing the answer, but that he desired at least one day after said list should have been delivered to file his answer. The fiscal opposed said motion, and the court having heard the argument of both parties held that the defendant was entitled to have his petition granted and ordered the fiscal to deliver to the defendant or his counsel a list of the persons which the prosecution, at the time of such delivery, might intend to use as witnesses.

Cebu, Cebu, P. I., December 11th, 1905.

(Signed) ADOLPH WISLEZENUS,
Judge of the 11th District.

8 The United States of America, Philippine Islands. Court of First Instance of the Province of Cebu.

UNITED STATES *vs.* C. M. PENDLETON. } Assassination.

To the accused or his counsel:

The following is a correct list of the witnesses for the prosecution in the above-entitled cause.

Marcos Gimnasi, Bonifacio Adarna, Florencio Graba, and Emeterio Montero.

Cebu, Cebu, P. I., December 13th, 1905.

(Signed) SERGIO OS,
Provincial Fiscal of Cebu.

Received a copy December 13th, 1905, at 9.30.

(Signed) JOHN W. SLEEPER,
Counsel for the Defense.

9 United States of America, Philippine Islands, Province of Cebu. In the Court of First Instance of the Province of Cebu.

THE UNITED STATES
vs.
C. M. PENDLETON.

The defendant prays that an order be issued to the provincial fiscal ordering him to return to the defendant the sworn statement made by the defendant the 1st day of December, 1905, before said fiscal, together with all the copies of the same that the fiscal may have, and that the fiscal be prohibited from using said sworn statement in any manner whatsoever:

(a) Because compelling an accused person to testify against himself is contrary to the act of the Congress of the United States which says that no person shall be compelled to be a witness against himself.

(b) Because said statement was made as a result of a subpœna issued by the fiscal when the defendant was a prisoner, without notice or advice to him that he had a right to refuse to make such statement, and without having consulted a lawyer, and without the defendant's knowing that he had a right to appear by means of counsel at any stage of the proceedings.

And the defendant exhibited his affidavit in support of this petition.

Cebu, Cebu, P. I., December 13, 1905.

(Sgnd.) JOHN W. SLEEPER,
Counsel for the Defense.

10 In the Court of First Instance of the Province of Cebu.

THE UNITED STATES
vs.
C. M. PENDLETON.

The defendant prays the court that an order be issued to the fiscal to file with the records of the above-entitled cause the sworn statements on which was based the authority to issue the warrant for the arrest of said defendant, to wit, the statements of Marcos Ginnasi, Bonifacio Adarna, Florencio Graba, Eneterio Montero, inasmuch as the same are set forth in the list of the fiscal; because without sufficient affidavits the warrant of arrest lacks the authority of law, infringing the law of the Congress of the United States which says: "That no warrant shall issue but upon probable cause, supported by oath or affirmation," and (b) "that no person shall be held to answer for a criminal offense without due process of law."

(Signed) JOHN W. SLEEPER,
Counsel for the Defense.

11 In the Court of First Instance of the Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON.

C. M. Pendleton appears and, being duly sworn, states:

That he is the defendant in the above-entitled cause; that the first day of December, 1905, while he was under arrest in his quarters in the house of the commanding officer a subpœna issued from the office of the fiscal was delivered to him, and said defendant obeying the same went to the fiscal's office, and there answered the fiscal's questions; that he was not notified that he had a right to refuse to do so; that he supposed that he had no such right; that he did not know that the object of securing his statement was in order to search for proof against him; that he was not represented by counsel and did not that he had a right to consult a lawyer.

(Signed) C. M. PENDLETON.

Subscribed and sworn to before me this 13th day of December, 1905.

(Signed) ADOLPH WISLEZENUS,
Judge of the 11th Judicial District.

12 I, Bonifacio Adarna, being duly sworn, make the following statement:

That I am the chief of police of the city of Cebu; that I was the chief of police on December 9th, 1905; that I know Mr. Sleeper, counsel for the defendant, Pendleton, in the cause of the United States *vs.* Pendleton, for assassination; that I know that he demanded of me data and information regarding the death of the policeman, Unabia; that I have never refused to give him any kind of information, except a written report which he demanded of me, which I did not give him, because I did not believe that it was my duty to furnish him with a written report; that I have furnished him with the names of all the policemen who were on guard in the vicinity of the place to which they belong.

In witness whereof I set my hand in Cebu, Cebu, this 13th day of December, 1905.

(Signed) BONIFACIO ADARNA.

Subscribed and sworn to before me this 13th day of December, 1905.

(Signed) ADOLPH WISLEZENUS,
Judge of the 11th Judicial District.

13 I, Sergio Osmeña, being duly sworn, make the following statement:

That I am the provincial fiscal of Cebu; that I have been such fiscal since before the ninth of this month up to the present; that I am acquainted with the facts in the cause of the United States *vs.*

Pendleton for assassination; that by reason of this knowledge I can affirm and assert that all the witnesses in this cause live in Cebu within the municipal limits and within half a mile from the court-house.

In witness whereof I set my hand in Cebu, Cebu, this 13th day of October, 1905.

SERGIO OSMEÑA.

Subscribed and sworn to before me this 13th day of December, 1905.

ADOLPH WISLEZENUS,
Judge 11th District.

14 In the Court of First Instance of the Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON.

The defendant, after filing his answer, prays a reasonable period for preparing his defense, and states to the court that a period of two weeks would be reasonable; and in support of his petition exhibits his affidavit to the court.

JOHN W. SLEEPER,
Counsel for the Defendant.

15 In the Court of First Instance of the Province of Cebu.

THE UNITED STATES
vs.
C. M. PENDLETON.

C. M. Pendleton appears and, being duly sworn, makes the following statement:

That he is the defendant in the above entitled cause; that the 1st day of December he was arrested, and that since said date up to and including the present he has been in jail; that no preliminary investigation has been held and the defendant has not seen any sworn statement as a basis for the accusation; that before the 13th day of December, 1905, he had not received any list of the witnesses who have been examined before the fiscal; that the defendant finds great difficulty in obtaining the facts of the charge against him; that the 7th of December the defendant, by means of his counsel, requested the chief of police to give certain information regarding facts known to said chief, but did not receive any information from him; that the 9th of December he wrote a letter to the chief, said letter and the chief's reply to the same being united to the present affidavit; that on the same day the defendant also write to the municipal president and about 1.00 p. m. Saturday, the 9th of December, and received the

answer which is also united to the present; that then he went to the office of the chief of police and was verbally informed of some facts but the chief refused to give said information in writing; that there are many questions to investigate and very few books to consult; that the jail is very far from the office of the counsel for defendant and much time is needed for consultation; a translator is needed for the hearing and it is not certain that there is one in Cebu.

16 Wherefore, the defendant states that a period of two weeks is reasonable for the preparation of his defense.

C. M. PENDLETON.

Subscribed and sworn to before me this day of December, 1905.

ADOLPH WISLIZENUS.

17 CEBU, CEBU, *December 9, 1905.*

The Chief of Police of the Municipality of Cebu, Cebu, P. I.

MY DEAR SIR: It is necessary to learn the following facts which must appear in the books of your office, in order to use them in the hearing of the cause entitled The United States *vs.* C. M. Pendleton, in the Court of First Instance of the province of Cebu.

Exactly when did the corpse of the deceased man, Leoncio Unabia, reach the town hall, and did you receive the body, or who did?

At what time was the first news received in your office of the death of Leoncio Unabia, and from whom was such information received?

What are the names of the persons accompanying the corpse when it came to the town hall? What kind of vehicle did they use?

On Friday, December 1, 1905, from 1.00 to 4.00 a. m., where were the beats of the policemen Leon Donan, Alencio Camo, Marcio Arbordo, Ramon Almonte, Leoncio Unabia?

Who was the captain of the detachment of police assigned to duty during the same hours at the local station of San Nicolas?

At what hour was the news of the death received at that station and from whom was the news received?

I beg you to do me the favor of informing me as to these facts.

Yours, faithfully,

JOHN W. SLEEPER,
Counsel for C. M. Pendleton.

(Indorsement on same appears on next sheet.)

18 CEBU, CEBU, *December 8, 1905.*

Mr. JOHN W. SLEEPER, *Lawyer.*

SIR: Respectfully returned to Mr. Sleeper, with the information that I am very sorry not to be able to inform him, unless you direct this letter to the municipal president, who is my immediate superior.

BONIFACIO ADARNA.

19 CEBU, CEBU, *December 9, 1905.*

The Municipal President of Cebu.

SIR: I have the honor of referring to you a copy of a letter delivered to the chief of police together with a copy of his answer. Have the kindness to read them and to furnish such particulars as would be pertinent to the case.

It seems very strange to refuse a prisoner knowledge of what the official public registers show in regard to facts necessary for his defense.

Awaiting your decision, I am,

Yours, respectfully,

JOHN W. SLEEPER,
Counsel for C. M. Pendleton.

[1st indorsement.]

OFFICE OF THE MUNICIPAL PRESIDENT OF CEBU, *Dec. 9, 1905.*

Respectfully returned to the lawyer, Mr. Sleeper, with the information that the municipal chief of police has been instructed to furnish all the data whenever asked to do so personally in the quarters of said body. Therefore you can go personally to the chief of police in his office, where said official is ready to furnish you with the desired data.

LUCIANO BALDAJOS,
Municipal President.

(Pencil note:) Rec'd at 1.15 p. m., Dec. 9th.

20 The United States of America, Philippine Islands. Court of First Instance, Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

The above-entitled cause having been called in this court December 13th, 1905, the accused appeared with his counsel, Mr. J. W. Sleeper, and the fiscal appeared for the government.

The counsel for the defendant presented a motion to the court praying that the fiscal be not permitted to use the statement made by the defendant in the office of the fiscal; and the court denied said motion on the ground that it was not the proper time to make such motion, as the court could not then decide on the admissibility of proofs which had not yet been offered in the cause, to which ruling Mr. Sleeper excepted.

Then said counsel for the defendant presented another motion asking that the sworn statements made in the fiscal's office on which the order for the arrest of the defendant was based, be filed with the court records. The court denied the motion, to which ruling Mr. Sleeper excepted.

The defendant then plead "not guilty" to the complaint which had heretofore been read to him.

Whereupon the counsel for the defendant presented a written motion accompanied by an affidavit praying that the hearing of the cause be suspended for two weeks from the present date. To which the fiscal objected and presented counter affidavits; and the court having read the motion and all the affidavits presented for and against the same, and having heard and considered the argu-
21 ments of both parties, set the hearing of this cause for 9 a. m. December 20th, 1905. To which ruling the counsel for the defendant excepted.

Cebu, Cebu, P. I., December 13th, 1905.

ADOLPH WISLEZENUS,
Judge 11th District.

22 The United States of America, Philippine Islands. Court of First Instance, Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

ORDER.

The hearing of the above entitled cause having been called this 20th day of December, 1905, the defendant appeared with his counsel, Mr. J. W. Sleeper, and the fiscal appeared for the United States.

Mr. Andrés Borromeo, deputy provincial fiscal for Cebu and East Negros, stated to the court that Mr. Sergio Osmeña, fiscal for Cebu and East Negros, had had charge of this cause and that by reason of his knowledge of the same his presence and assistance were necessary, and as he was sick it was impossible for him to be present and aid in the hearing of this cause, and prayed that the case be transferred to December 27th, 1905. The counsel for the defendant making no objection, the court ordered that the hearing of the cause be suspended until 9 a. m. December 27th, 1905, with which the hearing was ended.

Cebu, Cebu, P. I., December 20th, 1905.

ADOLPH WISLEZENUS,
Judge 11th District.

23 The United States of America, Philippine Islands. Court of First Instance of the Province of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

SENTENCE.

This court has been occupied more than a week in hearing this cause and the arguments of the fiscal and counsel for the defense,

both parties having shown immense zeal and erudition in presenting the same, together with their dignified deportment, which has greatly pleased the court and has demonstrated the high personal attainments and gentlemanly character of the counsel of both parties.

The prosecution has presented an abundance of proof which, in case the court should give it full credence, would establish the guilt of the accused beyond all reasonable doubt. On the other hand, the defense has presented very little direct proof; the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably to him. The defense has practically limited itself to insisting on: (1) Alleged contradictions between the various witnesses of the prosecution relating to the details of identical facts or happenings related by them. (2) Mistakes which they claim to be essential, in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case. (3) The expert testimony of two physicians that the deceased could not have died as the result of a wound received in the manner stated by the witnesses for the prosecution.

24 In regard to the contradictions which are alleged to exist between the statements of various witnesses for the Government, some are not at all contradictory; others are contradictory rather in appearance than in reality, and only a few appear to be really contradictory; but human eyes and brains do not have the power of remembering the happening of a moment with the fidelity and exactness of a cinematograph. It is a well-recognized fact that when a certain number of trustworthy eyewitnesses testify about the same occurrence they are very liable to differ from one another as to the incidental details related to such fact. Experience also recognizes that complete accord on the part of a great number of witnesses as to secondary details gives rise to suspicions as to the veracity of such witnesses. The court has made a careful examination of the alleged contradictions and variations and finds that they are either nonexistant, or of little importance, or consistent with the most perfect veracity of the witness. Thus it can be said, especially with respect to the ignorance of the greater part of the witnesses and the fact that surrounding circumstances were not very favorable to fixing such details, which is particularly applicable to the constabulary witnesses who were wandering about in the dark, crowded together in a carromata and commanded by an officer crazy from drink.

With respect to the errors alleged to have been committed by the witnesses of the Government with reference to circumstances and relative positions of persons and objects related to the case, the court also believes that they are of little importance. Very few people are able to give exact accounts of things. Therefore, three witnesses for the defense differ diametrically in fixing the scene of the homicide, which place they examined together a day after the occurrence, with the expectation of testifying in court about the matter; these wit-

25 nesses, respectively, a constabulary officer, a civil engineer, and a photographer. If persons skilled in their professions show

such diversity of opinion, very little can be expected of ignorant men who have very probably never had a tapeline in their hands.

As the last hope of the defense there exists the testimony of the expert physicians who testified in favor of the defendant, and whose statements tend to prove that the wounds described to them, although imperfectly, could not have caused the death of the deceased at the distance and in the manner stated by the witnesses of the Government. This court appreciates highly the personal character and professional attainments of the expert witnesses who testified for the defense, but in spite of that the court notes, in the first place, that the testimony of experts, as a general rule, is not evidence in a strict sense, but rather the opinions of the experts with reference to the effects of the proofs; so that proofs of this character have a very limited function, and it can not be permitted that alone and unsupported by facts they obscure facts established, as the court believes, beyond all reasonable doubt. Moreover, there are no proofs so uncertain and unsatisfactory as the testimony of experts, especially in criminal cases. The history of American criminal jurisprudence has shown that, given time and resources sufficient, there is scarcely any limit to the number of expert witnesses who can be found to testify in favor of both parties with reference to any proposition submitted to them; all being equally honorable, equally learned, and equally convinced that the experts of the opposite side are badly mistaken. In this case two physicians testified for the Government and two others for the defense, although it can be recognized that the experts for the defense have had wider experience in questions of gunshot wounds.

26 Under these circumstances the court believes that it is its duty to form an independent opinion, basing it on the facts stated by the eyewitnesses and without making use of the opinions of the experts, however learned these may be. And even though the court were disposed to permit the opinions of the experts for the defense (contradicted as they are by the opinions of the government experts) to contradict the statements of the eyewitnesses, said experts for the defense have named too many conditions for their reports to have the desired effect. They admit that the wounds could be produced in the manner and form stated by the government witnesses if the cartridge had contained a less amount or an inferior quality of powder than the ordinary, and precisely this is a circumstance which not infrequently occurs; they admit further that the explosive action of the projectile, on the absence on which they base their opinions, could have occurred in the interior course of the bullet and not especially at the orifices of entrance and exit, and besides this admission they add that they did not examine the interior course of the projectile in the body of the deceased, although they had an opportunity to do so and they base their opinions solely on an imperfect description of the wounds given by the physician who performed an incomplete autopsy. The court therefore can not consider the opinions of these experts, within the limitations and conditions of this cause, as in themselves

sufficient, without any corroborative fact whatever having been established, to destroy the testimony of the eyewitnesses.

The court, then, must use its judgment as to the credibility of the witnesses of the Government and the probability of the facts related by them. The court has done so, and feeling its responsibility in the cause finds that the following facts have been proved beyond the slightest shadow of a doubt:

27 FINDING OF FACTS.

On the night of November 30th, 1905, and the morning of December 1st, of the same year, the defendant was a lieutenant of constabulary stationed in Cebu, Cebu and was at that time in command of the constabulary quarters at said place. The accused drank heavily that night, and after midnight, being in a shameful state of drunkenness, borrowed a friend's carromata, which had neither lamps nor driver. The accused was not armed but was in uniform. About two a. m. the municipal policeman, Almonte, observed the carromata wandering aimlessly about the central part of the city of Cebu without lights or driver. The policeman went to the defendant and questioned him about the absence of lights, and the defendant requested him to drive him to the constabulary quarters. The policeman did so, acting as driver, and conducted him to the quarters already mentioned, where he arrived a little after two a. m., after which he immediately returned to his beat. What drunken motives could have inspired the accused to commit the acts hereinafter set forth? This court can not state them. There are men in whom strong drink has the power of disclosing the dormant savagery hidden in the breasts of many people; the accused appears to be one of these unfortunates, because immediately on arriving at the quarters he called the guard, snatched the carbine which Ruiz was carrying from his hands, against his will, and ordered him to get in the carromata together with three other constabulary soldiers, Maglinao, Tecson, and Gimnasi; the accused also got in and, with Ruiz as driver, started towards San Nicolas, a suburb of Cebu, all in uniform and armed with the exception of Ruiz, whose gun was carried by the accused. Going along the road the accused fired two shots into the air from his gun without thinking about
28 the accidents that might occur. The cartridges were taken from the belts of the terrorized constabulary men. Once the soldier Gimnasi humbly tried to stop the accused from shooting towards a group of houses and then the accused insulted him, kicked him, and struck him with the barrel of the gun; all this occurred almost immediately before the crime.

In the meanwhile four municipal policemen, who had gathered on the bridge known as "the Bridge of the Revolution" or as "Fagina," hurried thither, attracted by the noise of the shots. This place is one of the most frequented streets of Cebu. Those policemen were Deabordo, Quiamko, Dunan, and Onabia, the deceased. They saw that the carromata was coming towards them without lights and

one of the policemen called to those inside to stop; they took no notice of the order of the policeman and the latter followed after the carromata; farther on in the street C. Padilla the carromata stopped; the policemen approached, two on the right side and two on the left side of the vehicle; the deceased went up to the right side and stood near the driver's seat, and apparently asked a question about the absence of lights; the accused answering by asking the deceased who he was, what his business was; the question being repeated several times by the accused and Ruiz. The deceased answered, giving his name and business, and then the accused struck him with the barrel of his gun. Alarmed by this action, and moved by fear on learning who were inside of the carromata, the deceased decided to leave it, going by one side toward the rear; while he was walking, and at a distance of three steps, more or less, from the rear of said carromata and being almost at the left of the same with his back turned toward the rear of said carromata, the accused
29 turned about in his seat and without warning the deceased in any manner whatever, and without provocation, fired at him, resting the gun on the frame of the window in the rear of the carromata. The ball struck the policeman in the right side and came out of the left side of the body. He fell face downward and died instantly. At the moment when the accused fired on the deceased the latter did not expect, nor had he any reason to suppose, that the accused would fire at him. At the moment the shot was fired Gimnasi, terrified, jumped from the carromata, started to run toward El Pardo, and later returned to the quarters; on the way he informed a municipal policeman whom he met of what had happened. The three policemen, companions of the deceased, also started to run, whilst the accused got a light and, being satisfied that the policeman was dead, returned with his soldiers, with the exception of Gimnasi, to the quarters, and there ordered three other constabulary soldiers to come out; these three soldiers, Montero, Gabato, and Grava, armed and in uniform, followed the carromata on foot, and the others, excepting Gimnasi, who had run away, went in the carromata as before and thus arrived at the place where the corpse of the deceased was. The accused ordered them to put the corpse into the carromata and at once went to the town hall of the municipality of Cebu. With Ruiz as driver the accused went in the carromata with the corpse and the others followed on foot.

On reaching the town hall the accused called the chief of police and sent Ruiz to hurry up the constabulary men who had fallen behind because of being on foot. In the meanwhile the accused said to the chief of police that he had found the body of the policeman in the street without knowing what had caused his death and delivered the body to said chief. The other constabulary men who had arrived on foot came in, and then the accused took a threaten-
30 ing attitude telling the chief of police that he had a force sufficient to raise the building; as the chief of police answered him pacifically, the accused his six soldiers to get into the car-

romata, and he himself mounted and was again conducted to the quarters, where five of the soldiers dismounted, and the soldier Ruiz drove the accused to the house of the commanding officer, after which he returned to the quarters.

The court finds that the acts above set forth were committed by the accused while in a state of drunken'ess. No proof was presented as to whether the drunken'ess was habitual with the accused, and consequently the court must find that the accused's drunken'ess was not habitual.

As regards ag'ravating circumstances in the commission of the crime, the court finds that the accused did not avail himself of the nocturnity in order to commit the crime. As proof exists that the crime was committed as a consequence of the drunken'ess of the accused, the nocturnity seems to have been an accidental circumstance.

Nor is there any proof by which the court could consider the use of the armed force of constabulary as an ag'ravating circumstance. The presence of the constabulary was involuntary on their part. The defense itself has not alleged, either in its proofs or in its brief, that the constabulary men were in anywise responsible for the death of the deceased, and all the proofs show, beyond a doubt, that in fact they were nothing more than passive and terrified spectators. The crime was commit'ed by the accused personally in the presence of but without the aid of his soldiers. It is true that the accused was at that moment an officer of constabulary and also that he took possession of Ruiz' gun by reason of the authority that he had as such, but at the moment of taking the gun from Ruiz at the quarters the accused had no intention of killing the deceased. For the same reasons
31 the court should not consider as an ag'ravating circumstance the superiority of force, as the superior force that he represented did not take part in the commission of the crime. (See the United States vs. Cardona, vol. 1, No. 4 O. G., p. 1; the United States vs. Olaguer, vol. 1, O. G., p. 756; the United States vs. De la Torre, vol. 2, G. O., p. 434.)

The prosecution insists that the deceased was killed while trying to enforce the municipal ordinance in regard to lamps on vehicles, is an ag'ravating circumstance, and that the act was committed in defiance of superior authority. Without deciding whether or nor, under these circumstances, the authority of the policeman was superior to that of the constabulary, it is enough to say that in the trial the ex'tence of a municipal ordinance in regard to lamps on vehicles was not proved, and the court can not take judicial knowledge of any ordinance whatever.

This terminates the review of the ag'ravating and attenuating circumstances. At this place the court might meditate on the horror of the crime committed by the accused, a crime committed against the confidence placed in him by the Government and which has especially grieved the hearts of the Americans, but such thoughts are so painful and at the same time so self-evident that the court will pass to the

FINDING OF LAW.

The court finds that the act committed by the accused of killing the deceased constitutes the crime of assassination, defined and punished in article 403 of the Penal Code, by reason of the treachery employed by the accused in the commission thereof, as set forth in the findings of fact above stated.

The court finds that no ag'ravating circumstance concurred
32 in the commission of the crime and finds as an extenuating circumstance in favor of the accused his drunken'ess, which has not been proved to be habitual or posterior to the plan to kill the deceased.

SENTENCE.

Wherefore the court finds that the accused is guilty of the crime of assassination as charged in the complaint, and defined and punished in article 403 of the Penal Code, without any ag'ravating circumstance and with the extenuating circumstance of drunkenness, defined in paragraph 6, article 9, of the Penal Code.

Therefore the court sentences the accused to the penalty of cadena perpetua (perpetual chains) and the accessory penalties provided in article 54 of the Penal Code, to pay the heirs of the deceased Leoncio Unabia the indemnity of three thousand pesos, Philippine currency of conant, and to pay the costs of the cause.

It is so ordered.

Cebu, Cebu, P. I., Jan. 20, 1906.

ADOLPH WISLIZENUS,
Judge 11th District.

33 PUBLICATION.

The foregoing sentence was read and published in open court by the honorable judge of first instance of this court, Adolph Wislizenus, there being present the fiscal and the defendant, C. M. Pendleton, with his counsel, Mr. John W. Sleeper, who excepted to the sentence.

Cebu, Jan. 20, 1906.

MARIANO A. CUENCO,
Clerk of the Court.

34 The United States of America, Philippine Islands. Court of First Instance of Cebu.

THE UNITED STATES;
vs.
C. M. PENDLETON. } Assassination.

ORDER.

The above-entitled cause was called in this court the 22nd day of January, 1906, and the defendant appeared with his counsel, Mr. John W. Sleeper, and the fiscal appeared for the Government.

In view of the fact that through an error the sentence rendered in this cause on Jan. 20, 1906, is not in accordance with the findings of fact and law and the scale of penalties fixed by the Penal Code, the court, while confirming and ratifying all the findings of fact and law set forth in said sentence of Jan. 20, 1906, modifies it in the following manner:

The court finds that the defendant, C. M. Pendleton, is guilty of the crime of assassination, as charged in the complaint and defined and punished in article 403 of the Penal Code, without any aggravating circumstance and with the extenuating circumstance of drunkenness defined in the 6th paragraph of article 9 of the same code, and the court therefore condemns the accused to the penalty of twenty years of cadena temporal (temporary chains), with the accessory penalties provided in article 59, to pay the sum of three thousand pesos Philippine currency to the heirs of the deceased, Leoncio Onabia, as indemnity, and to pay the costs of the cause.

It is so ordered.

Cebu, Cebu, P. I., Jan. 22, 1906.

ADOLPH WISLIZENUS,
Judge 11th District.

35 NOTIFICATION.

I hereby certify that on this 22nd day of January, 1906, this court, presided over by the Honorable Judge Wislizenus, notified the fiscal and the accused, C. M. Pendleton, who was accompanied by his counsel, Mr. John W. Sleeper, of the foregoing order, in open court.

MARIANO A. CUENCO,
Clerk of the Court.

36 In the Court of First Instance of the Province of Cebu, Philippine Islands.

THE UNITED STATES
vs.
C. M. PENDLETON.

The defendant prays the court that the sentence in this cause be suspended and that the defendant be placed in liberty:

Because having once been convicted of the crime of assassination and no appeal having been taken from the sentence, and said sentence having been annulled without the motion of the accused, he can not be convicted of a lesser crime included within the crime of assassination, such as homicide, and can not again be put in jeopardy.

JOHN W. SLEEPER,
Counsel for the Defendant.

37 The United States of America, Philippine Islands, province of Cebu. In the Court of First Instance of the Province of Cebu.

THE UNITED STATES *vs.* C. M. PENDLETON. } Assassination.

The defendant hereby announces that he appeals to the Supreme Court of the Philippine Islands from the sentence rendered in the Court of First Instance the 22nd day of January, 1906.

Cebu, Cebu, Jan. 23, 1906.

C. M. PENDLETON.
JOHN W. SLEEPER.
Counsel for the Defendant.

I hereby certify that I have received a copy of the foregoing appeal this 23d day of January, 1906.

(Signed) GABINO CAPISTRANO,
Fiscal for Mohol, Acting in Cebu.

38 In Cebu, this 25th day of January, 1906, the defendant, C. M. Pendleton, appeared and was asked to name the counsel who would defend him in the Supreme Court of these islands. He stated that the same counsel who defended him in the Court of First Instance in this cause will defend him in the higher court. Wherefore he has appointed Mr. John W. Sleeper, and in witness of his signature I set my hand.

C. M. PENDLETON.
MARIANO A. CUENCO,
Clerk of the Court.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 16th day of February, 1906.

J. E. BLANCO, *Clerk.*

10:00 a. m.

Cebu, February 5, 1906, this cause is closed in order to send it to the Supreme Court. In witness whereof I set my hand.

MARIANO A. CUENCO,
Clerk of the Court.

39 United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES *vs.* C. M. PENDLETON. } No. 3176. February 9, 1907.

DECISION.

TRACEY, *J.*

This is a conviction for asesinato in killing a policeman named Leoncio Unabia in San Nicolas, Cebu, in the first hours of the morn-

ing of December 1st, 1905. The defendant, a lieutenant of constabulary in command at the Parian barracks at Cebu, being intoxicated, borrowed a carromata, which was without lights, from a friend, and was found wandering about the streets therein by a municipal policeman named Almonte, who at his request drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case.

Three men of his command testify that they witnessed the occurrence, and they relate that at the barracks he ordered out the guard and picked them, with a fourth man not produced at the trial, and ordered them to accompany him in the carromata, one Ruis, from whom he had snatched his gun, acting as driver. As they proceeded he twice discharged the gun which he held, the ball passing through the roof of the vehicle. These discharges were heard by four municipal policemen, who ordered the party to stop because they carried no lights. The policemen followed along until a stop
40 was made near a corner, when they came up, two on each side of the carromata. Asked by the defendant who they were, the deceased answered that he was a municipal policeman, and at this point there is some difference of recollection of the witnesses as to his precise reply and as to the distance at which he stood from the carromata. Some of the witnesses state that he was struck by the defendant with the barrel of the gun, while others do not seem to have observed any such act. They agree that he then passed on to the rear and started to cross the street, when the defendant, who was sitting on the right side of the carromata, with his left foot on the breast of one of his men named Gimnasi, whom he had been abusing, turned to the left, and thrusting his gun out of the rear window, fired, hitting Unabia, who immediately fell. In these particulars the soldiers are corroborated by two of the three surviving policemen and in the main by two neighbors who heard the shots. The three policemen fled, as did also Gimnasi. Directed by the defendant, Ruiz obtained a light from a neighboring house, with which they together view the body of Unabia, lying to the rear of the carromata, and finding him dead, the defendant with his three men drove back to the barracks. There obtaining the corporal of the guard with two additional men, he returned to the body and directing it placed in the carromata, took it to the office of the chief of police, and he thereafter returned to the barracks.

The defense criticises this testimony on two different grounds—the first, that the witnesses do not agree in various particulars, and the second, that their general conformity, together with an admission that they had talked it over among themselves, indicates a fictitious story. The discrepancies in this testimony are only such as naturally occur in the accounts of men who, in excitement, witness rapidly passing events of moment. A perfect agree-
41 ment of recollection or of narrative in such circumstances is impossible, and if it existed would discredit their story.

The theory of a fictitious narrative presupposes a conspiracy not only of the three constabulary soldiers, but also of two policemen, of the neighbors, of the municipal president, and of other witnesses—of so many persons that some of them could hardly fail to betray it. The absence from the trial of one of the constabulary and one of the policemen would be significant were there evidence that there was any special reason for not producing them, or that the defendant could not have called them. No effort is shown on his part to find either of them.

The chief reliance of defendant's counsel seems to have been on the testimony of these men, apparently locating the vehicle with relation to the neighboring houses at a point fully twenty feet from the spots of blood where the body had lain, while they swore that the deceased had fallen only about three feet away from their stopping place. This was strongly brought out on a view of the spot by the trial court, after the closing of the testimony, when the carromata placed three feet from the blood spots did not correspond with what the witnesses had told of the near-by houses and lights. Considering, however, the conditions of the occurrence, the excitement of the drive with a drunken superior who was punishing his soldiers and shooting in the air, the obscurity of the night, the killing of the policeman, and their own danger, these men can not be held to a rigid accuracy as to distances. Twenty feet in relation to barely visible objects along a street at night time is not a considerable distance, and an error to this extent, if it existed, would not suffice to destroy the credibility of the witnesses.

The other circumstances urged by the defence are of minor
42 importance. One Montero swore that after daylight he found the revolver of the deceased several yards from the body, indicating that the policeman had not been shot near where he lay, but had been carried thither. In this he was contradicted by testimony that the revolver was under the body and by the fact that the soldiers who examined the ground with a light before daybreak had not noticed it.

Expert testimony was given that the forty-five caliber ball fired from a Springfield carbine at a distance of three feet would have an explosive effect on the human body, whereas Unabia's wound was clean cut. It was admitted, however, that an inferior powder or a light charge would do away with the explosion, and nothing was proved as to the nature or quantity of the powder in the cartridge; nor is the distance of three feet estimated by the witnesses a certain one.

A constabulary shoulder-strap, together with two empty shells found near the blood marks, were presented as proof of a fruitless attempt to implicate the accused in the crime. But we have nothing to reveal to us whether the object of placing them where they were found was to cast suspicion on the defendant or, on the other hand, to justify the theory of a conspiracy against him. This false evidence may have been devised either in his favor or to his prejudice.

On the whole, there is nothing to offset the very strong proof of the prosecution in this case. The term of four weeks from arraignment of the accused and three weeks from his attendance with counsel was ample for preparation for the trial, which was conducted with deliberation. The courts rightly refused to unnecessarily delay the administration of criminal justice.

43 The method of the execution of the crime in firing upon the victim, who unaware was turned and walking away from the perpetrator, involving no risk to the latter, qualifies it as committed with alevosia, constituting asesinato. The drunkenness not having been proved to be habitual, is an extenuating circumstance, calling for punishment in the minimum grade of the crime.

The trial court first imposed a sentence of cadena perpetua, which was afterwards changed to cadena temporal, with imprisonment for twenty years, and indemnity of three thousand pesos and costs. This sentence is reduced to a term of imprisonment for seventeen years, four months, and one day and one thousand pesos indemnity, with the costs of both instances.

Arellano, C. J., Torres, Mapa, Carson, and Willard, J. J., concur.

ST.

44 The United States of America, Philippine Islands. In the Supreme Court.

THE UNITED STATES, APPELLEE, *vs.* C. M. PENDLETON, APPELLANT. } No. 3176.

The above-named appellant hereby presents his motion praying the court that he be granted his liberty under bond for such amount as may be fixed by the court, with bondsmen who shall be approved by any justice or judge in Manila.

JOHN W. SLEEPER.
Counsel for the Appellant, 47 Nueva Street, Manila.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 20th day of March, 1906.

J. E. BLANCO, *Clerk.*

3.50 p. m.

45 The United States of America, Philippine Islands. In the Supreme Court.

THE UNITED STATES, APPELLEE, *vs.* C. M. PENDLETON, APPELLANT. } No. 3176.

To the Solicitor-General:

I have the honor to inform you that Monday, March 26th, 1906, at 9 a. m., the above-mentioned appellant will file his motion praying

that he be admitted to bail and that the amount of the bond be fixed by the court with duly accredited bondsmen who shall be approved by any magistrate of Manila. A copy of the motion is inclosed.

JOHN W. SLEEPER,
Attorney for Appellant, 47 Calle Nueva, Ermita, Manila.

Received a copy this 20/1906.

R. D. BLANCHARD,
Assistant Attorney, Bureau of Justice.

46 No. 3176.

United States of America. Supreme Court of the Philippine Islands.

UNITED STATES, COMPLAINANT AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT. } Assassination.

Counsel, Mr. John W. Sleeper.

The solicitor-general appears for the Government of the United States and states:

That he waives the period fixed by the rule of court for the effect of the notification given the counsel for the Government of the motion of the counsel for the defendant, asking for his liberty under bond; and has no objection to the court's deciding said motion without the necessity of a hearing.

That the crime charged being assassination, which is punishable by temporary chains in the maximum degree to death, and is therefore a capital crime according to paragraph No. 2 of section 64 of General Order No. 58, the defendant appellant can not be granted his provisional liberty under bond pending appeal, as said paragraph No. 2 only leaves it to the discretion of the court to grant liberty in causes in which capital crimes are not charged. In case, however, that the court should decide that it has discretion to grant the accused his provisional liberty under bond, counsel for the Government suggests that the defendant be required to file a bond in the amount of ₱20,000, Philippines currency.

Manila, March 27th, 1906.

GREGORIO ARENETA,
Solicitor-General.

47 Filed in the clerk's office of the Supreme Court of the Philippine Islands this 28th day of March, 1906.

(Signed) BLANCO, *Clerk.*

8.30 a. m.

48 SUPREME COURT, *March 30, 1906.*

SIR: The Supreme Court, in its session of the 29th instant, passed the following resolution:

"The court on hearing the motion of Mr. Sleeper in cause No. 3176 against C. M. Pendleton, for assassination, praying for the pro-

visional liberty of the accused, resolved to fix the amount of the bond at 20,000 pesos, Philippines currency; ordering the attorney-general to approve the bond, and after it has been filed in the office of the clerk of this court let the order be issued to the proper authority for his immediate release."

Which is hereby transmitted to you for your information.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

To Mr. SLEEPER and the ATTORNEY-GENERAL.

49 United States of America, Philippine Islands. Supreme Court of the Philippine Islands.

UNITED STATES, APPELLEE,
vs.
C. M. PENDLETON, APPELLANT. } No. 3176.

Annexed to the appellant's brief to the Supreme Court are the following assignments of error:

1. From the proofs presented at the hearing the guilt of the accused is not established beyond a reasonable doubt.

2. The court erred in denying the defendant a reasonable period to prepare his defense.

3. The court erred in sentencing the defendant to pay the amount of 3,000 pesos.

4. The court erred in denying the exclusion of Ruiz as a witness for the prosecution.

5. The court erred in finding that the act committed by the defendant in killing the deceased constitutes the crime of assassination.

6. The court erred in rejecting all the testimony of the witnesses for the defense and the marks on the ground and all the circumstances contradicting the proofs of the Government.

JOHN W. SLEEPER,
Counsel for Appellant.

50 APRIL 18TH, 1906.

DIRECTOR OF PRISONS, *Manila, P. I.*

SIR: By virtue of a resolution of this court passed on March 26th last, in the cause, United States against C. M. Pendleton, number 154 of the Court of First Instance of Cebu, No. 3176 of the General Register of this court, for the crime of assassination, you are hereby ordered to immediately set said defendant at liberty, as he has given bond in the sum of ₱20,000, approved by the attorney-general, as required by said resolution, unless there should be some other cause against him for which he should continue under detention.

Very respectfully,

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

51 The United States of America. Supreme Court of the Philippine Islands.

[Extract of the minutes of the session of September 6th, 1906.]

The hearing of cause No. 3176 against C. M. Pendleton, for assassination, having been called, only Mr. Sleeper, counsel for the defendant, appeared, and his argument having been heard, said cause was submitted to the court, which resolved to take same under consideration and to deliver sentence at some future date.

R. HERAS.
Deputy Clerk Supreme Court of the Philippine Islands.

Present: Honorable Chief Justice, Justices Torres, Mapa, Carson, Willard, and Tracey.

52 The United States of America. Supreme Court of the Philippine Islands.

G. R. No. 3176.

MANILA, *February 11, 1907.*

THE UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

Mr.

SIR: You are hereby notified that on the 9th day of February, 1907, a decision was rendered by this court in the above-entitled cause, filed in this office, whereby the sentence appealed from was modified and the defendant is sentenced to seventeen years, four months, and one day prison and to pay an indemnity of one thousand pesos and the costs in both instances. After ten days let the sentence be entered accordingly, and ten days thereafter let the case be returned to the lower court for execution.

J. E. BLANCO.
Clerk of the Supreme Court of the Philippine Islands.
By R. HERAS, *Deputy Clerk.*

Copy for Attorney-General and J. W. Sleeper.

53 The United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF,
vs.
C. M. PENDLETON, DEFENDANT. } No. 3176.

The defendant appears personally and informs the court that he has employed Attorney W. A. Kincaid as his counsel in the above-entitled cause and that in the future the said counsel will represent him.

Manila, February 20th, 1907.

CHAS. M. PENDLETON,
Defendant.

54 R. G. No. 3176.

The United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF AND APPELLEE, *vs.* C. M. PENDLETON, DEFENDANT AND APPELLANT.	Exception to the judgment, and motion for a new trial.

Now comes the defendant and appellant and states to the court:

1. He excepts to the judgment rendered by the court in this cause on February 9th, 1907, of which he was notified the 11th of the same month.

2. Prays the court to set aside its judgment and to grant him a new trial for the following reasons:

I. The defendant has been compelled to testify against himself in violation of art. No. 5 of the law of Congress of July 1, 1902, in the following manner:

The accused, taking advantage of the right conceded him in the 3rd paragraph of article 15 of the General Orders, No. 58, did not testify in the Court of First Instance, and said court in its judgment considered this circumstance as prejudicial to the defendant: and the attorney-general adduced the same circumstance in his brief in this court in the following words:

"No direct proof was presented by the defence to contradict the facts stated by the witnesses for the prosecution: nor did the defendant himself testify in his own favor to deny the grave crime with which he is charged."

55 And to overcome as far as possible the effect of this illegal procedure so prejudicial to the accused, his counsel in this court, speaking in his name, felt himself obliged to state to the court that the defendant did not go on the witness stand because he did not remember anything about the occurrence: which circumstance was considered by the court as a fact prejudicial to the defendant and appellant, in the following words:

"The defendant, a lieutenant of constabulary in command at the Parian Barracks at Cebu, being intoxicated borrowed a carromata, which was without lights, from a friend and was found wandering about the streets therein by a municipal policeman named Almonte, who at his request drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case."

This procedure is entirely unconstitutional and has greatly prejudiced the defendant, not only in the effects of the judgment in this cause, but also for a petition for pardon which he might present to the executive authority.

II. The proofs do not justify the decision of this court, as the guilt of the defendant can not be adduced from them beyond all reasonable doubt.

Manila, February 20, 1907.

W. A. KINCAID,
Counsel for Defendant and Appellant.

56 SUPREME COURT, *February 28, 1907.*

SIR: The Supreme Court, in session the 27th inst., adopted the following resolution:

"The court, having heard the petition of Attorney Kincaid, praying for a new trial of case No. 3176, the United States vs. Pendleton, in which a decision was rendered by this court on the 9th of the present month of February, 1907, said, that although the fact that the defendant declined or failed to testify as a witness was taken into consideration by the Court of First Instance, this court, in deciding the cause, did not take said fact into consideration, but rendered the decision in accordance with the proofs presented at the trial, and, therefore, the new trial solicited is denied."

Which is transmitted to you for your information.

J. E. BLANCO,
Clerk, Supreme Court, P. I.

The ATTORNEY-GENERAL and Mr. KINCAID.

57 R. G. No. 3176.

United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT.

Comes now the defendant and appellant and excepts to the decision of the court overruling the motion for a new trial presented in this case.

Therefore, he prays the court to admit this exception as having been presented in due time and manner.

Manila, February 28, 1907.

W. A. KINCAID,
Counsel for Defendant and Appellant.

58 SUPREME COURT, *March 2, 1907.*

SIR: The Supreme Court, in session the 2nd inst., adopted the following resolution:

"The court resolved to admit as presented in due time and manner the exception taken by counsel Kincaid to the decision of this court in which it denied the petition to annul the sentence pronounced in the cause No. 3176, the United States *vs.* Pendleton, for the crime of assassination."

Copy furnished you for your information.

J. E. BLANCO,
Clerk, Supreme Court, P. I.

Copy for the Attorney-General and Mr. Kincaid.

59 The United States of America. Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE: *vs.* C. M. PENDLETON, DEFENDANT AND APPELLANT.	Sentence. March 2, 1907. Book of sentences 4, F. Register No. 3176.

This court having acquired due jurisdiction to hear the above entitled cause, which was submitted for decision by both parties, and after being considered by the court, together with the records, and its decision and order having been registered the ninth day of February, 1907,

By virtue of said order, the sentence appealed from, rendered by the Court of First Instance of Cebu on January 20, 1906, is hereby modified, and the defendant is sentenced to imprisonment for seventeen years, four months, and one day, and one thousand pesos indemnity, with the costs of both instances; the amount of costs in this court being twelve dollars gold, which the judge of first instance will proceed to collect by judicial order.

It is further ordered that the cause be remanded to the court below for execution.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

60 R. G. No. 3176.

The United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE, *vs.* C. M. PENDLETON, DEFENDANT AND APPELLANT.	

Now comes the defendant and appellant and excepts to the final judgment rendered in this cause.

Therefore, he prays the court to admit this exception as filed in due time and manner.

Manila, March 2, 1907.

W. A. KINCAID,
Counsel for the Defendant Appellant.

61 The United States of America. Supreme Court of the Philippine Islands.

MANILA, *March 6, 1907.*

SIR: This court in session the 3d inst. adopted the following resolution:

"Having heard the petition presented by Counsel Kincaid excepting to the final sentence rendered in cause No. 3176, against Pendleton,

and praying that said exception be admitted as presented in due time and manner, the court resolved to admit said exception and ordered it to be united with the records."

Copy furnished you for your information.

J. E. BLANCO,
Clerk, Supreme Court, P. I.

Copy for the Attorney-General and Mr. Kincaid.

62 United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT. } No. 3176.

Comes now the defendant and appellant in this cause and prays the court that preparatory to the bill of exceptions to be drawn up in this cause, there be drawn up and placed in the record a statement of the facts on which the court based its decision.

Manila, March 18, 1907.

W. A. KINCAID,
Counsel for the Defendant and Appellant.

63 The United States of America. The Supreme Court of the Philippine Islands.

MANILA, *March 20, 1907.*

SIR: This Supreme Court, in session the 19th inst., adopted the following resolution:

"The petition presented by Counsel Kincaid having been heard, praying that as a preliminary to the bill of exceptions which is to be presented in the cause No. 3176 against Pendleton, there be prepared for the records a statement of the facts on which this court based its decision, the court denied the petition."

Copy furnished you for your information.

J. E. BLANCO,
Clerk, Supreme Court, P. I.

Copy for the Attorney-General and Mr. Kincaid.

64 United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT.

Comes C. M. Pendleton, defendant and appellant in the above entitled cause, and represents:

I.

That judgment has been rendered in said cause by which the judgment of the Court of First Instance convicting the petitioner, C. M.

Pendleton, for the offense of murder to perpetual chain has been modified to seventeen years four months and one day of imprisonment and one thousand pesos as indemnification, in violation of the Philippine bill, as appears from the accompanying assignment of errors.

II.

Wherefore petitioner prays that he be granted a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands, with a supersedeas of the judgment, and that upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, he be admitted to bail pending such writ of error, in order that the judgment may be revised by the Supreme Court of the United States upon the
65 assignment of errors presented with this petition.

He also prays that the record of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Sigd.) W. A. KINCAID,
Attorney for Petitioner.

66 In the Supreme Court of the United States.

In the matter of the petition of

C. M. PENDLETON, PLAINTIFF IN ERROR,
versus
THE UNITED STATES, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS.

Comes C. M. Pendleton and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

The accused has been compelled to be a witness against himself, in violation of art. five of law of Congress of July 1, 1902.

II.

The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice, in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

III.

The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt.

Wherefore said C. M. Pendleton prays that the judgment of the Supreme Court of the Philippine Islands be reversed and the cause

remanded to that court with instructions to dismiss the prosecution against him.

(Sgd.) W. A. KINCAID,
Attorney for Plaintiff in Error.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the Supreme Court of the Philippine Islands, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between the United States, plaintiff and appellee, and C. M. Pendelton, defendant and appellant, a manifest error hath happened, to the great damage of the said C. M. Pendelton, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 14th day of July, 1907, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and customs of the United States should be done.

68 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of March, in the year of our Lord 1907.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by C. M. Pendelton in the sum of eight thousand dollars U. S. cy., payable to the defendant in error, conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

69 THE UNITED STATES OF AMERICA, *ss.*

To Attorney-General for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within one hundred and twenty days from the date of this citation,

pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein C. M. Pendelton is plaintiff in error and the United States defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord 1907.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this 16 day of March, 1907.

GREGORIO ARANETA,
Attorney-General for the Philippine Islands,
By GEO. R. HARVEY,
Assistant Attorney-General.

70 R. G. No. 3176.

United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT. } Exception.

Comes now the defendant and appellant and excepts to the decision of the court denying the motion of the appellant in which he prayed that as a preliminary to the bill of exceptions there be caused to appear in the records a statement of the facts on which the decision of this court was based.

Therefore he prays the court to admit this exception as filed in due time and manner.

Manila, March 21, 1907.

W. A. KINCAID,
Counsel for the Defendant, Appellant.

71 United States of America. The Supreme Court of the Philippine Islands.

MANILA, *March 23, 1907.*

SIR: This Supreme Court, in session the 22nd inst., adopted the following resolution:

"Having heard the motion presented by the counsel, Kincaid, excepting to the resolution of this court, dated the 19th day of this month of March, 1907, denying the petition of the 18th in the cause

No. 3176, against Pendleton, the court resolved to admit said exception as presented in due time and manner, and ordered that it be united with the records."

Copy furnished for your information.

J. E. BLANCO,
Clerk Supreme Court P. I.

Copy for W. A. Kincaid and Attorney-General.

72 Estados Unidos de America. Islas Filipinas.

LOS ESTADOS UNIDOS, QUERELLANTE Y APELADO,
contra
C. M. PENDLETON, ACUSADO Y APELANTE. } Fianza.

Por cuanto, C. M. Pendleton, acusado y apelante en la causa arriba titulada, ha sido condenado en la Corte Suprema de las Islas Filipinas del delito de asesinato, y habiendo obtenido writ of error del Tribunal Supremo de los Estados Unidos á la Corte Suprema de las Islas Filipinas para revocar dicha sentencia, y

Por cuanto, por orden del Honorable James F. Tracey, magistrado de la Corte Suprema de las Islas Filipinas quien concedió dicho writ of error, se ha concedido á dicho C. M. Pendleton su libertad provisional durante la tramitación de dicho writ of error mediante una fianza por la cantidad de diez y seis mil pesos (₱16,000.00).

Por tanto, nosotros, C. M. Pendleton, como principal y Manuel Lopez y Pedro Martinez como fiadores, mancomunada y solidariamente por la presente respondemos de que el arriba nombrado C. M. Pendleton, pagará la multa que el Tribunal Supremo de los Estados Unidos ordenare ó que se entregará para el cumplimento de la sentencia que dictare dicho Tribunal, ó en caso de que la causa sea devuelta para nuevo juicio, comparecerá ante el Tribunal á que se haya devuelto y se someterá á las ordenes y procesos del mismo, ó que si falfare al cumplimiento de cualquiera de estas condi-
73 ciones, pagará los Estados Unidos la cantidad de diez y seis mil pesos (₱16,000.00).

Y para que conste firmamos en Manila el dia 18 de Marzo de mil novecientos siete.

(Fdo) CHAS. M. PENDLETON.

(Fdo) M. LOPEZ.
" PEDRO MARTINEZ.

ISLAS FILIPINAS,
Ciudad de Manila.

Ante mi la autoridad infrascrita en esta fecha comparecieron personalmente los Sres. Manuel Lopez y Pedro Martinez, quienes previo juramento prestado en forma legal dicen: que son las personas que suscriben la fianza que precede, que son solventes y poseedores de bienes raices en las Islas Filipinas y que cada uno posee bienes

que valen la cantidad especificada en dicha obligación con exclusión de todas sus deudas y obligaciones exentos de ejecución.

(Fdo) M. LOPEZ.
" PEDRO MARTINEZ.

Jurados y suscritos ante mi hoy 18 de Marzo de 1907. Presentaron sus respectivas cédulas No. A 496224 expedida el dia 23 de Enero de 1907, No A 0516 expedida el dia 2 de Enero de 1907.

(Fdo) ROBERTO MORENO,
Notario Público.

El nombramiento termina el 31 de Diciembre de 1908.
Approved.
(Fdo) JAMES F. TRACEY.

74 [Translation.]

The United States of America. Philippine Islands.

THE UNITED STATES, PLAINTIFF AND APPELLEE, *vs.* C. M. PENDLETON, DEFENDANT AND APPELLANT. } Bond.

Whereas, C. M. Pendleton, defendant and appellant in the above-entitled cause, has been convicted by the Supreme Court of the Philippine Islands of the crime of assassination, and he having obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands for the revocation of such sentence; and

Whereas, by order of the Honorable James F. Tracey, the justice of the Supreme Court of the Philippine Islands who granted the said writ of error, the said C. M. Pendleton has been granted provisional liberty during the pendency of the said writ of error under a bond in the sum of sixteen thousand pesos (P16,000.00);

Therefore, we, C. M. Pendleton, as principal, and Manuel Lopez and Pedro Martinez, as sureties, do jointly and severally obligate ourselves that the said C. M. Pendleton will pay the fine which the Supreme Court of the United States may direct, or will comply with the sentence that the said court may render, or, should the case
75 be returned for a new trial, that he will appear before the court to which the same is returned and submit himself to the orders and processes of the same, or, if he shall fail to comply with any one of these conditions, we will pay to the United States the sum of sixteen thousand pesos (P16,000.00).

And in witness whereof we sign in Manila, the 18th day of March, in the year nineteen hundred and seven.

(Signed) CHAS. M. PENDLETON.
(Signed) M. LOPEZ.
" PEDRO MARTINEZ.

PHILIPPINE ISLANDS,
City of Manila.

Personally appeared before me, the undersigned authority, Manuel Lopez and Pedro Martinez, who, having been first duly sworn, state: That they are the persons who signed the foregoing bond; that they are solvent and possess real property in the Philippine Islands, and that each one possesses property of the value specified in the said obligation, exclusive of their debts and obligations and exempt from execution.

(Sgd.) M. LOPEZ.
" PEDRO MARTINEZ.

Subscribed and sworn to before me this 18th day of March, 1907. Cedulas No. A496224, issued the 23rd of January, 1907, and No. A0516, issued the 2nd of January, 1907, respectively, being exhibited.

(Signed) ROBERTO MORENO,
[Seal of notary.] *Notary Public.*

My appointment terminates the 31st of December, 1908.

Approved.

(Sgd.) JAMES F. TRACEY.

76 United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT. } No. 3176.

Comes now the defendant and appellant in the above-entitled cause and presents to the court the enclosed bill of exceptions for the reviewing of the sentence rendered by this court in this cause, by means of the writ of error from the Supreme Court of the United States in Washington to this court.

Therefore, he prays the court to approve, legalize, and order that said bill of exceptions be filed as part of the records in this cause.

He further prays the court to extend the time for the filing of the records in the office of the clerk of the Supreme Court of the United States because the delay caused by the preparation of the bill of exceptions does not leave sufficient time to file them within the time fixed by the rules.

Manila, July 11, 1907.

W. A. KINCAID,
Counsel for the Defendant and Appellant.

77 United States of America. The Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
C. M. PENDLETON, DEFENDANT AND APPELLANT. } No. 3176.

To the Attorney-General of the Philippine Islands.

SIR: You are hereby notified that I shall present the preceding motion to the Supreme Court of these islands as soon as said court shall be in session.

Manila, July 11, 1907.

W. A. KINCAID,
Counsel for the Defendant and Appellant.

Received a copy of this notification, bill of exceptions, and of the attached motion this 11th day of July, 1907.

GEO. R. HARVEY,
Acting Attorney-General.

78 United States of America. Supreme Court of the Philippine Islands.

MANILA, P. I., *July 15, 1907.*

SIR: This court in session the 13th inst. adopted the following resolution:

"In the case No. 3176, the United States *vs.* C. M. Pendleton, Mr. W. A. Kinkaid, counsel for the defendant, appeared and prayed that the filing of the bill of exceptions as part of the records in this cause be approved, legalized, and ordered, and that the time for filing the records in the office of the Clerk of the Supreme Court of the United States be extended. After due deliberation the court resolved not to admit said bill of exceptions and to grant him an extension of sixty days to carry the records to the Supreme Court of the United States."

Copy furnished for your information.

R. HERAS,
Acting Clerk of the Supreme Court, P. I.

Copy for Attorney-General and Mr. W. A. Kinkaid.

79 United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES, PLAINTIFF AND APPELLEE,
versus
C. M. PENDLETON, DEFENDANT AND APPELLANT.

It having been made to appear that the translation of the record in this case and the preparation of the transcript cannot be completed within the time allowed by the former order enlarging the time for the purpose of docketing and filing the case in the Supreme Court in

Washington, the same is hereby further enlarged so that is shall not expire for sixty days from this date.

Witness my hand this 11th day of September, 1907.

(Sgd.) JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Pilippine Islands, who granted the writ of error in said cause.

80 United States of America. In the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
C. M. PENDLETON.

It having been made to appear that the translation of the record in this case and the preparation of the transcript cannot be completed within the time allowed by the former orders enlarging the time for the purpose of docketing and filing this case in the Supreme Court of the United States in Washington, the same is hereby further extended so that it shall not expire until December 11, 1907.

Witness my hand this 22d day of October, 1907.

[SEAL.] (Sgd.) JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Pilippine Islands, who granted the writ of error in said cause.

81. UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

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82 United States of America, Philippine Islands. In the Court of First Instance of Cebu.

UNITED STATES
vs.
C. M. PENDLETON. } Assassination.

The hearing of the above-entitled cause was called on the 27th day of December, 1905, the accused being present and being represented by his counsel, Mr. John W. Sleeper, and the United States being represented by the fiscal (provincial prosecuting attorney). At once the court ordered the hearing to begin, and the fiscal presented the following proofs.

The counsel for the defendant presented Mr. Morris to act as interpreter from English to Spanish and vice versa for the defense, and after having been duly sworn by the court to interpret faithfully and correctly he was accepted.

At once the fiscal presented as the first witness for the prosecution Fabian Ruiz. The counsel for the defendant objected to the presentation of said person as a witness because his name did not appear in the list of witnesses given him by the fiscal, and because he could satisfy the court, by proof, that the said person had been examined before the hearing and before the delivery of said list in the office of the fiscal as a witness in this case. The fiscal opposes the
83 motion for the reason that the law does not strictly require the presentation of all the witnesses, either for the prosecution or for the defense, so that he would be unable to present other new witnesses who might previously have been examined and who should come into court on the day of the hearing. The court overruled the objection. Mr. Sleeper took exception to the ruling.

FABIAN RUIZ, resident of Cebu; 25 years of age; constabulary soldier; being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. How long have you been a constabulary soldier?

A. More than a year.

Q. In November last year were you a constabulary soldier?

A. Yes, sir.

Q. Do you remember the official holiday called Thanksgiving Day in that month?

A. Yes, sir.

Q. On that day of the official holiday, where were you?

A. Here in Cebu.

Q. In what part of Cebu?

A. In the suburb of San Nicolas.

Q. Where were you at night?

A. At home.

Q. Do you know the accused, who is wearing a black coat [pointing]?

A. Yes, sir.

Q. What is his name?

A. Mr. Pendleton.

Q. What is his business; do you know?

A. I knew that he is a constabulary officer.

Q. In what constabulary quarters were you the 30th of
84 November last, the official holiday?

A. In the quarters on Calle de Colon.

Q. On the night of that day, who was the guard at the quarters?

A. My companions.

Q. How many were there in the guard?

A. Only three remained at the door.

Q. Did you or did you not see the accused in the quarters that night?

A. Yes, sir; I saw him about two a. m. when he arrived.

Q. Relate what passed there in the quarters when the accused arrived

A. When he arrived he got out of a carromata, as I was near the door; but inside it he took the gun from me which I had. I did not want to give it to him, and the corporal of the guard told me that I should give it to him because he is our commanding officer. Afterward he looked for other soldiers. He said, calling, "á todos los guardias," which means that he wanted to see all the guards and made us go outside. There were four of us.

Q. Who?

A. I, Gimnasi, Tecson, and Maglinao. When we were outside the door, as the driver who had come in the carromata was no longer there, I got in and acted as driver, taking hold of the reins. Afterward he had four of us get in and he made the fifth.

Q. How were you in there?

A. He said that we should get into the carromata and he also got in.

Q. Who drove the horse?

A. I.

Q. Who was sitting on the seat of the carromata?

85 A. Mr. Pendleton and Tecson.

Q. Where were the other two, Gimnasi and Maglinao?

A. They were sitting beside me: Maglinao on the left and Gimnasi on the right.

Q. Looking in which direction?

A. In the same direction as I; on towards the horse.

Q. I again ask you, who were sitting on the seat of the carromata?

A. Mr. Pendleton and Tecson.

Q. In which direction were those two looking?

A. Toward me.

Q. In the same position as you?

A. Yes, sir.

Q. And the other two, Gimnasi and Maglinao; where were they looking?

A. Backward.

Q. Facing the two?

A. Yes, sir; facing Pendleton and Tecson.

Q. Riding thus in the carromata; where did you go?

A. We went towards the street of the theater, beyond it to St. Nicolas.

Q. What occurred in St. Nicolas?

A. Upon arriving at St. Nicolas, the lieutenant made me stop; I stopped at his order and at that moment the policeman approached.

Q. Who was that policeman?

A. I do not remember the name of that policeman, but it occurred that when the policeman arrived, Mr. Pendleton asked him who he was. As the policeman was slow about answering, then I spoke and asked him what his name was. Afterward he answered, giving his name. Then Mr. Pendleton asked the same policeman what
86 his surname was, but the policeman did not answer and, without saying anything, came around behind us. I noticed that the policeman had come around behind us and at that moment a gunshot sounded.

Q. Who had the gun which was fired?

A. Mr. Pendleton.

Q. Whose gun was it which Mr. Pendleton had?

A. The gun which I had had and which he took from me when I was with the guard.

Q. Who fired?

A. He. Immediately after having heard the noise of the gun I turned my face about and the lieutenant said to me "one dead; one dead man." At once he ordered me to look for a light because he had been touching the side where the carromata lantern is and saw that there was no candle, and as there was a light beside the place where we were, I got it and brought it.

Q. Where was that light which you mentioned?

A. It was in a house standing at the foot of a stairway on the same lot.

Q. Well, you have brought the light, continue; what more?

A. Mr. Pendleton ordered that I should carry the light further on, that is to say, toward a point somewhat more distant. He told me that I should walk a little ahead, and as I was afraid, instead of walking ahead I went back, turned around, and on arriving at the place where the carromata was, I got into it and left the light where it was.

Q. In what place?

A. On the ground near the church of St. Nicolas, because it was out.

Q. Before Mr. Pendleton ordered you to go in advance to light the way, what place were you lighting?

A. Just as soon as I arrived with the light Mr. Pendleton
87 ordered me to hold it at the side where the corpse was and I did so. Afterwards, being in the place where the corpse was,

Mr. Pendleton ordered me to walk further away from where the corpse was; and as I was afraid, instead of going farther on, I turned around again. Afterward, when he was in the carromata, he said to me, "go on," and then I drove the horse and we went to the quarters.

Q. Before you people went away you saw the corpse? Whose corpse was that?

A. That of the policeman.

Q. What policeman was that?

A. The same policeman who approached us who was asked his surname by Mr. Pendleton; who did not answer and who went around behind us.

Q. A policeman of this town?

A. Yes, sir; here of the city.

Q. How was he dressed?

A. The same as a policeman.

Q. Repeat the very words of Mr. Pendleton when he was questioning the policeman?

A. First, Mr. Pendleton said, "Who are you? Who are you?" As the policeman was very slow about speaking, I spoke to him and said, "Who are you? What is your name?" At once Mr. Pendleton asked the policeman what his surname was and the policeman, instead of answering, I noticed that he went around behind the carromata in which we were and afterward was when the gunshot sounded.

Q. Did you people know who that policeman was who approached you and whom Mr. Pendleton asked his name?

A. The first answer which he gave was that he was a policeman and afterward was when the lieutenant asked him his name.

88 Q. You were ordered by the lieutenant to bring a light; did anyone else get out of the carromata?

A. Immediately after having fired the gun, Giminasi jumped out of the carromata.

Q. And where did he go?

A. He went away from the place where we were.

Q. But how did he jump out, and how did he go—running or walking?

A. He started to run, through fear.

Q. Why was he afraid?

A. Before the occurrence with the policeman, Giminasi was kicked by the lieutenant and put out on the ground.

Q. And after you people turned around did Giminasi again return to the carromata?

A. He did not. I did not see him afterward. He did not show himself there again.

Q. Who remained there, then?

A. I, Maglinao, and Tecson.

Q. Together with whom?

A. There were three of us who remained.

Q. But together with whom?

A. With Mr. Pendleton.

Q. Toward what place did you people go when Mr. Pendleton ordered the return?

A. We went to the quarters.

Q. What more did you do?

A. Afterwards he got out of the carromata.

Q. After being in the quarters, what happened?

A. After he was out of the carromata he asked who the corporal of the guard was. The corporal, Grava, said that it was Grava, and the corporal of the guard himself approached, saying "I am the corporal of the guard." Then Mr. Pendleton said to him that
89 he should look for the soldiers and asked where the others were who were on guard, and, by virtue of that order, he went about awaking all those who were sleeping, and afterward all of us collected at the same door.

Q. Who collected there?

A. All of us, at the door.

Q. The door of the quarters?

A. Yes, sir.

Q. Was Mr. Pendleton the only one who got out of the carromata?

A. Yes, sir; because he went looking for the guards.

Q. Were the guards who were awakened those who collected?

A. Yes, sir.

Q. What more did he do?

A. Afterward he made the corporal of the guard, Grava, go out, and one, Gabato, and another of ours, in charge, whose name I do not remember, but who was also a constabulary soldier.

Q. What more did he do when he ordered those three to go out?

A. When those three were outside whom Mr. Pendleton ordered to go out, he said "Let us go," and as the carromata did not hold all of us, the others went on foot.

Q. Who went on foot?

A. Grava, Gabato, and the man in charge.

Q. And in the carromata?

A. The same four, Maglinao, Tecson, Pendleton, and myself.

Q. Were you people armed?

A. Yes, sir; because we were on guard.

Q. With what arms?

A. Gun.

90 Q. The gun that you people carried?

A. Yes, sir.

Q. The constabulary gun?

A. The same.

Q. State the names of those who carried a gun the first time.

A. Gimnasi, Maglinao, Tecson, and Mr. Pendleton carried mine because he took it from me.

Q. Did Mr. Pendleton have the gun when he left the quarters?

A. Yes, sir.

Q. And you did not have any?

A. I did not have a gun.

Q. Before arriving at the place where the corpse was, was any shot fired or not?

A. Immediately on leaving the quarters, on arriving near the street of the theater, Mr. Pendleton fired a shot into the air.

Q. What other shots did he fire?

A. Afterward, not very long afterward, and before arriving at the bridge of Fajina, he fired another shot.

Q. Who fired it?

A. Mr. Pendleton.

Q. What more?

A. Afterward we went on, and arriving at a place which is very near the church of St. Nicolas was when he said, "Stop."

Q. Now, let us return to the second time. When you people left the quarters with the three who were on foot, what did you do?

A. Afterward, when we started, I continued as driver and started towards the quarters of the commanding officer, but Mr. Pen-
91 dleton said that we should not go to the quarters of the commanding officer, but to the place where the dead man was. We went in the direction of the place where the policeman fell, and on arriving there he got out and went near the place where the corpse was. But the first thing that he did was to whistle, calling the corporal of the guard, and as no one answered, he returned to near the carromata, which had halted in a place near the place where the policeman fell, and on his return to the carromata he said, "Where is the dead man?" I said to him, "He is here," and showed him where the corpse was. Afterwards he ordered that the corpse should be loaded into the carromata, saying, "Load," and we loaded it in. When it was in the carromata those who were on foot arrived, I being the only one who was in the carromata, because I was the driver, and so all the others came on foot. Afterward, at a certain distance from where those were who had come on foot, Mr. Pendleton got into the loaded carromata and the others continued on foot. I drove on at a walk towards the corner house where Mr. Cabucayan lived, and then I asked the lieutenant, "Where are we going?" and Mr. Pendleton said to me, "Going to the town hall." On arriving at the town hall he got out and was talking to the lieutenant of police. After the conference which he had with him, several policemen came out and picked up the corpse, which was in the carromata.

Q. Do you know those policemen who picked up the corpse?

A. I do not know them.

Q. Did you not recognize their faces?

A. I did not recognize them, because it was night.

Q. Did you recognize the lieutenant of police, to whom Mr. Pendleton spoke?

A. Yes, sir; I know him.

Q. Who is he; what is his name?

92 A. I believe he is Bonifacio, if I remember correctly.

Q. What else happened after Mr. Pendleton had delivered the corpse?

A. After he asked me where the other soldiers, our companions, were, whom we had left because they were coming on foot and we were the only ones who were in the carromata, and when he asked me that question, I answered him that they were behind us. He ordered me to go out and meet them, and when I met them I told them that by order of the lieutenant they should go there. When those soldiers arrived at the door of the town hall he made each of them take off their hats and, upon uncovering their head, each of them had to tell his name, and so every one of them gave his name; Maglinao, Tecson, etc. After all had told their names, and he being in the carromata, he did not let any of us go on foot, but made all of us get into the same carromata.

Q. And where did you people go?

A. To the quarters.

Q. When you went away from the town hall, did all get into the same carromata?

A. Yes, sir.

Q. And you people got into the carromata?

A. As there was only a small space and there were six of us, Grava said that it would not hold all of us, but the lieutenant said, "Yes," and everyone sat where he could, in spite of the fact that the size of the carromata would not permit that number. After we arrived at the quarters the soldiers got out of the carromata and I drove Mr. Pendleton to the quarters of the commanding officer. After having left him at the quarters of the commanding officer he told me to unhitch the carromata, and I did so. I tied the horse and went to sleep.

93 Q. On that night who was in command of the detachment of constabulary where you were?

A. A man in charge whose name was Montero.

Q. Who put him in charge?

A. According to what they said in the quarters, he was in charge temporarily because Corporal Gallan was under arrest.

Q. What I am asking you is, who was the commanding officer of that post?

A. Mr. Pendleton.

FISCAL. Nothing more.

Cross-examination by Mr. SLEEPER, counsel for the defendant:

Q. Where do you live?

A. In the quarters.

Q. How long have you lived at Cebu?

A. Since I was very young; since I was a child.

Q. Are the places, Calle de Colon and the church of St. Nicolas, familiar to you?

A. I know the Calle de Colon, because I was for a long time in the house of Mr. Florentino Rollas, and also on Calle Carlock.

Q. Showing you this photograph, Exhibit A, state if this represents faithfully the carromata which was used on the night in question.

FISCAL. I object to the question, because identifications by means of a photograph are very difficult, and the court can make an ocular examination with greater security; and the witness may become mixed on the photograph or the plans.

COURT. Objection is overruled.

94 FISCAL. Note an exception.

A. This is the shape of that carromata they had, but without the driver.

Q. Now, then, where was Mr. Pendleton sitting?

FISCAL. I make a general objection to all these question' which tend to establish in this way the identification of the carromata.

A. Mr. Pendleton was on one of the further sides; inside the carromata itself; and on the other side was Tecson [the witness points to the right side as the place where the accused was].

Q. Where was Gimnasi; on the same side where Mr. Pendleton was?

A. He was on the driver's seat with his back to the driver and facing Mr. Pendleton.

Q. Was anyone sitting inside the carromata on the floor?

A. Yes, sir; I was sitting on the driver's seat.

Q. Gimnasi was sitting beside the driver in front of Mr. Pendleton and Tecson?

A. Yes, sir; but not exactly in front, but on a line looking toward Mr. Pendleton.

Q. And were your feet placed inside the carromata on the floor?

A. No, sir, one foot outside; because Mr. Pendleton had his feet on the floor of the carromata.

Q. Were the feet of Mr. Pendleton on the carromata steps or on the floor?

A. On the floor.

Q. And Maglinao was sitting, looking toward Tecson, was he not, and also beside the driver?

95 A. Tecson and Maglinao were facing each other.

Q. And the feet of the three were inside the carromata, or on the steps?

A. Maglinao's feet were not on the floor of the carromata, but away from the floor of the carromata, because he was holding to one of the posts and his feet were on one of the shafts.

COURT. Then was Maglinao on the driver's seat?

A. Yes, sir; the three of us were in that place.

COUNSEL FOR DEFENDANT. Where was the gun?

A. It was resting in its position.

Q. And did you people all keep the same position from the time you left the quarters until the policeman was dead?

A. Yes, sir.

Q. Were you on guard at the quarters when the defendant came there the first time?

A. No, sir.

Q. Did you see Mr. Pendleton the first time he was in the quarters?

A. Yes, sir; because the corporal of the guard awoke me.

Q. What was the name of that policeman?

FISCAL. I object to that question because the witness has testified nothing in regard to that.

COURT. The objection is overruled.

Q. You have stated that a shot was fired after leaving the quarters. Where was that shot fired?

A. There, in the barrio of Pajo.

Q. Besides what house or what edifice?

A. I did not take much notice of what houses were near the place in which the first shot was fired, but I do remember that it was in that place.

96 Q. At what distance from the quarters?

A. Near the hippodrome; on the other side of the theater.

Q. How was that shot fired; from the front of the carromata or from behind?

A. Upward, inside the carromata itself, and the projectile passed through the top of the carromata.

Q. Did you see the lieutenant fire that shot?

A. I noticed when he fired the shot, because he asked one of our companions for the cartridge.

Q. And he asked for it before or after he fired?

A. Before he fired the shot.

Q. When did he unload the gun?

A. After having fired he opened the gun and took out the empty shell.

Q. Did he again load the gun after firing the shot, immediately?

A. No, sir; as the soldiers did not want to give him the cartridges he took them from them, and in view of his desire that they should give him cartridges, they gave them to him.

Q. From whom did he take the balls by force?

A. He took two from Tecson.

Q. How long after firing the first shot did he reload the gun?

A. As I continued as driver and the carromata went on, what I can state is, that he fired the gun the first time in the place I have already indicated and the second time a little before arriving at the bridge of Fajina.

Q. Did he reload the gun after having fired the second shot; and if he loaded it, did he load it near the bridge?

A. I can not state exactly, because he was behind me and I did

97 not see him when he loaded it the second time, but I say that after having fired the first shot I heard the gun open and knew that he unloaded it, taking out the empty shell. The first shot was before arriving at the bridge of Fajina. After the first shot was when he asked for cartridges.

Q. Were you people going slowly or quickly?

A. The natural gait of the horse.

Q. How far is it from the bridge to the place where the carromata stopped with the lieutenant?

A. It must be as far as from here to near the theater.

Q. Did the carromata stop before the policeman was killed?

A. We were standing still before the policeman arrived; before the policeman who died approached.

Q. At what distance was the policeman from the carromata when you saw him the first time?

A. He approached quite near. He almost took hold of one of the shafts of the carromata.

Q. On which side of the horse was the policeman when he approached?

A. On the same side where Mr. Pendleton was sitting. He was near the carromata itself, holding one of the shafts [the witness points to the right side].

Q. And where did he grasp the shafts; toward the front where the horse was, or toward the place near the seat?

A. At the side where the driver's seat was.

Q. How long did he remain there holding the shafts?

A. I believe it was about two minutes.

Q. What did the policeman say to you at that time?

A. He, himself, did not say anything. When he saw Mr. Pendleton, the latter asked him his name.

Q. How long was the carromata standing there before the policeman came?

98 A. Less than a minute.

Q. From what direction did the policeman come? Did he come from the direction of some of the houses, or did he come down the street toward Cebu?

A. Without my knowing where he came from, he appeared at my side.

Q. He appeared without you seeing him come?

A. I did not know where he came from, because I at once heard that Mr. Pendleton said to him, "Who are you?" And then was when I saw his face.

Q. Was there no light then in the street or on the carromata?

A. There was no light on the carromata, but there was in one of the lanter's which there are on the street; that is to say, as far as from here to that door, I saw a lantern. [The distance which the witness indicated having been measured, it was found to be forty feet.]

Q. Was that light in front or behind the carromata?

A. Behind.

Q. Was the light on the corner or in the middle of the block?

A. At the side of the street.

Q. When the policeman left the carromata, going around behind toward the back, at what distance from the wheel of the carromata did he pass?

A. Behind, near the wheel.

Q. At a distance, or near the wheel?
A. Near the wheel, at a distance of two feet.
Q. Did he go directly toward Cebu on the same street?
A. Yes, sir.
Q. And did he continue in the same direction until the shot was fired?
99 A. According to my estimate he must have taken three or four steps.
COURT. Court is adjourned until 3.00 p. m.

SECOND SESSION.

The continuation of the hearing of the above-entitled cause was called at 3.00 p. m. December 27, 1905, there being present persons named in the beginning, and the following proofs were presented:

Continued cross-examination of FABIAN RUIZ:

COUNSEL FOR DEFENDANT. Crossing the street in which the policeman was killed, is there a corner facing the church?
A. Yes, sir; there is a corner.
Q. Was there a light on that corner?
A. I did not observe whether or not there was a lantern there or not.
Q. Was there a lighted lantern on the street which crosses in front of the church door?
A. There is a lantern.
Q. Did you see any other light from the time you left the quarters until the place where the act occurred?
A. Yes, sir; I saw lanterns beside the street.
Q. Were there other lanterns?
A. The lanterns which I have mentioned, which are at the ends of the sides of the street.
Q. From the time you left the quarters until you arrived at the place where this affair occurred, did you see any other policemen besides the dead man?
A. I saw some policeman, the companions of that one who died.
100 Q. Where did you see those policemen?
A. Immediately after the gun was fired, I saw those two policemen running.
Q. In what direction were they running?
A. Towards the beach: farther away in the same direction in front of me.
Q. Towards the mountain, or towards where; or on which side?
A. Towards the street, del Pardo, toward el Pardo.
Q. Did you see them in the house of Cabucayan?
A. No, sir; the house of Cabucayan is in the other direction; it was necessary to turn the corner.
Q. Is the house of Cabucayan in the direction of the street del Pardo, where the policeman was fired upon?

A. No, sir.

Q. Do you know where the street of Panay is?

A. Because the streets have had their names changed not long since, I do not know where that street is.

Q. The policemen who were running along the street from the place where the other policeman died, were they running to the Pardo, away from the carromata?

A. Yes, sir.

Q. At what distance were those two policemen from the carromata when you saw them the first time?

A. The carromata in which we were was in the street at one side. On the same street at the other side, is where I saw the policemen who started to run.

Q. At what distance were they from the carromata when you saw them the first time?

A. I can not calculate the distance, but it is the width of the street, from one side to the other. We were on one side and the two policemen whom I saw running were in the same street, but on the opposite side of it.

Q. On which side of the street was the carromata and on
101 which side were the two policemen?

A. Going toward el Pardo; the carromata was standing on the right and the policemen on the left side, toward the fence.

Q. Were the two policemen standing beside the fence or the wall?

A. I did not see that they were standing; I saw that after the shot was fired they started to run.

Q. When you saw them running at first, did you see them near the fence or in the middle of the street?

A. As there was no wall there I saw them running near the fence.

Q. At what distance from the right side of the street was the carromata standing; was it very near?

A. At the distance of two yards.

Q. Two yards from the fence?

A. Yes, sir; from the fence.

Q. How far was the carromata from the house where you got the light?

A. As far as from here to that door. [In the judgment of the court, about four or five meters.]

NOTE.—The fiscal presents a motion to the court asking for the exclusion of the witnesses of the prosecution, as well as those of the defense, and in view of the statement of counsel for the defendant that at present none of his witnesses are in the court room that he knows he is going to use as such, with the exception of Dr. Captain Kulp, of the United States Army.

COURT. I overrule the motion in regard to this gentleman as being unnecessary, and as regards the other witnesses, not being in a position to comply with the motion.

102 FISCAL. Note an exception.

Q. Was the house from where you got the light on the right-hand side of the street?

A. Yes, sir; to the right.

Q. Was the light farther on toward El Pardo or where it crosses to Cebu?

A. Toward El Pardo.

Q. When Gimnasi left the corromata was it before the shot or afterward, or at the same time?

A. After the gun was fired.

Q. When the lieutenant struck Gimnasi was it before or after the shot?

A. Before; when the carromata was in motion.

Q. How long before?

A. When the carromata stopped Pendleton was punishing Gimnasi, striking him with the end of the gun, near his abdomen.

Q. What did that man do to Mr. Pendleton that he should strike him?

A. I do not know what the reason was, but while the corromata was going I heard the noise of Gimnasi complaining of the pain, and saying "Sir! sir!" so that I told him to move over a little, because he disturbed me in the seat where I was sitting, pushing against me, because of the pain he felt.

Q. How long did that last; until the carromata stopped?

A. I believe the carromata must have gone more than five meters from the time I heard Gimnasi complaining of the pain.

Q. And you could not see what happened to this man, because he was behind you?

103 A. This was my position [the witness indicates]. When he was complaining of the pain Gimnasi's head leaned toward my leg, and as I was disturbed in that position, I told him that he should move over a little.

Q. Can you describe the policeman who was killed?

A. When I saw the dead policeman, because Mr. Pendleton ordered me to hold the light, I saw that he was stretched on the ground.

Q. When you saw the policeman standing beside the carromata did you notice his height and other details?

A. I could not note his height exactly, because it was night, but when the policeman was standing by my side I recognized that he was a policeman.

Q. Did you see his face? What was the color of his face?

A. I did not see his face.

Q. When you saw the face of that policeman was it when he was dead?

A. When he approached the carromata, if, indeed, I did not see his face, I did see he was a policeman, because he had on his helmet and uniform.

Q. Did he have a revolver?

A. Yes, sir; he had a revolver.

Q. Did he have the revolver in front or behind?

A. I do not know on which side he had the revolver, because when his corpse was picked up it was Montero who took the revolver.

Q. When the policeman who was killed left the carromata did he go on a walk or on a run?

A. No, sir: just a natural gait.

Q. Did Gimnasi leave the carromata before or after the light was brought?

A. Before the light was brought.

104 Q. Did he run or did he walk?

A. He started to run.

Q. In what direction?

A. In the direction of El Pardo.

Q. Was he running in the center of the street, or on one side?

A. When he jumped from the carromata I just got one glance of him when he was in front of the horse, and as the night was dark, after he passed the horse I did not again see him.

Q. Did Gimnasi carry his gun with him?

A. Yes, sir.

Q. When you went for the light was it lighted or not?

A. It was lighted, and for that reason Mr. Pendleton ordered me to bring that light which was at the bottom of the stairway of a house.

Q. Did you see anyone in the street?

A. I did not see anyone.

Q. When you returned with the light where was the corpse?

A. The place from where I brought the light was in front of the corpse.

COURT. The house where the light was, was in front of the corpse?

A. Not exactly in front, but a little to one side.

Q. But when you returned with the light, where was the corpse?

A. In the middle of the street, beside our carromata.

Q. At what distance from the lights in the street?

A. For example, here where I am sitting is the street; the place where the policeman fell and the lantern, was at the door [forty feet distance].

Q. Take Exhibit A in your hands and tell me how the six

105 constabulary men and the lieutenant were sitting when they went from the town hall to the quarters.

A. Three were sitting beside me; I was driving, and behind me there were three. Grava was in the same position as I, at my side; that is to say, on the driver's seat at my right side. The three who were behind me were not sitting as one ought to sit, because it was difficult; but they were not half sitting; holding the posts of the carromata, and in the seat was Mr. Pendleton with another constabulary man.

Q. Have you gone back to the place in question where the policeman was killed since the day of that occurrence?

A. As far as I remember I have not gone back there, except that same night after having lighted the corpse, returning there from the quarters with the other three constabulary men.

Q. That is not the question: have you or not returned to that place since that day?

A. I have never returned there.

Q. Was it the first of December when the first notice was given of the death of the policeman?

A. We four, companions of the defendant, were talking among ourselves about what happened to our chief and we agreed that we ought to do nothing else than testify to what had happened; to tell the whole truth.

Q. That is not the question; but when did you give the first notice of what had occurred on Friday?

A. At this moment I do not remember that I gave notice that Friday.

Q. Were you in the office of the fiscal on Friday?

A. I do not know what day it was when we were called to come here.

Q. Do you not remember that the morning after the day of
106 on which the policeman was killed, you talked with Mr. Nevill about this case?

A. We did not talk.

Q. Did you not talk to any other person that morning, or did anyone else question you that morning?

A. Flores, a first-class guard, who is our companion, questioned me.

Q. Was that on Friday?

A. I do not know what day it was, but it is certain that we*re* were talking about this circumstance.

Q. Was that the same day on which the policeman was killed?

A. No, sir.

Q. Do you not remember having been in the office of the fiscal the day the policeman was killed?

A. For example, this is the day of the burial of the policeman who died, and this same day, the night we were called or cited by the fiscal and we came to his office.

Q. Was the policeman buried the same day he died?

A. On the afternoon of the same day was when the burial of the policeman who died took place.

Q. At what time of that same day were you in the office of the fiscal?

A. It was night when he called us; in the evening. It must have been between six and seven.

Nothing more.

Redirect examination by the FISCAL:

Q. Are the statements you have made to the court in the examination and cross-examination exact, or almost so?

A. In regard to the distances, the place from one side to the other which I have shown to the court, is the distance which I have shown just as far as it was.

107 Q. And in regard to the time?

A. I estimate that it was between two and three o'clock.

Q. Did you measure the distance there?

A. I did not measure them. It is my estimate according to my faithful knowledge and understanding.

FISCAL. Nothing more.

COURT. When you people left the quarters the second time, as you say, did you leave no one at the quarters?

A. Those who were on guard remained there.

COURT. Call the next witness.

URBANO MAGLINAO, resident of San Nicolas; single; 23 years of age; constabulary soldier; being duly sworn, testified as follows:

Counsel for the defendant opposes to this witness testifying for the same reasons set forth with regard to the preceding witness.

The fiscal reproduced the same reasons related formerly and in view of the further fact that the counsel for the defense did not duly request the clerk of this court to deliver him a list of the witnesses.

The judge overruled the motion of counsel for the defense, and the latter takes exception.

Direct examination by the FISCAL:

Q. Since when have you been a constabulary soldier?

A. Since February, 1905.

Q. In the month of November past, where were you stationed as a constabulary soldier?

A. In the mountain.

108 Q. Were you not stationed in Cebu?

A. In the month of February I was here in Cebu.

Q. On the 30th day of the month of November, or the day of the official holiday, Thanksgiving day, where were you?

A. I was in the quarters.

Q. On the night of that day, where were you?

A. In the quarters.

Q. Do you know the defendant who is sitting there [pointing]?

A. Yes, sir.

Q. Who is he?

A. Mr. Pendleton.

Q. What is he in the constabulary?

A. Lieutenant of constabulary.

Q. On the night of November 30th, did you see Lieutenant Pendleton?

A. Yes, sir; I saw him, because he went to the quarters.

Q. What did he do there? Relate it.

A. When he arrived at the quarters he came in a carromata, without a driver; the one who had brought him was a policeman. Afterwards he got out of the carromata and entered the quarters.

Q. What more?

A. When he was inside the quarters he awoke the guards; when they were awake one of them named Ruiz went out to the carromata carrying a gun, there being with him our lieutenant, who took the gun from him.

Q. Who is your lieutenant?
A. Mr. Pendleton.
Q. The defendant?
A. The same.
Q. Continue.
A. As Ruiz did not want to give him the gun, the one on
109 guard told Ruiz he should give it to him, because it was our officer; he asked him for it. Then the gun being in the possession of the lieutenant, he was examining it, opening and closing it, and after this he gave the order, "calling," to gather up those who were on guard, and after the guards had collected he selected us four.
Q. Who?
A. Gimnasi, Tecson, Ruiz, and I.
Q. What more?
A. After having selected us four, he pushed us toward the carromata which was outside the quarters and had us get into the same. The driver was Ruiz.
Q. Were you people armed?
A. Yes, sir.
Q. With what?
A. Guns.
Q. Official guns of the constabulary?
A. Yes, sir.
Q. Did each of you carry your ammunition?
A. Yes, sir.
Q. Did Ruiz, your driver, have a gun?
A. He did not carry it because our lieutenant took it from him.
Q. Continue.
A. After having gotten into the carromata we turned about and started in the direction of the street where the barrio of Pajo is. On arriving near the place, Pajo, the lieutenant fired a shot into the air.
Q. The defendant?
A. Yes, sir.
Q. Continue.
110 A. After having fired the gun into the air we continued and at the distance of about one hundred yards our lieutenant again fired.
Q. In what place was that second shot fired?
A. Near the place which is in front of a mango tree, before arriving at the bridge.
Q. Continue.
A. After that we continued and on arriving at a place the other side of the church of St. Nicolas, almost by the house of Nicholas Godinez, the lieutenant said "Stop." When the carromata was standing still, the voice of a man was heard. At once the lieutenant said "Halt." After having spoken that word, no one approached, except a policeman, who, when he approached, was asked his name.
Q. Who asked him?
A. Our lieutenant.

Q. Before the lieutenant questioned and said "Halt," what did the policeman answer?

A. He answered, saying, "Policeman."

Q. Why did he approach the carromata?

A. Before he answered, saying "Policeman," he did not approach the carromata. After that he approached the carromata.

Q. What more?

A. Immediately after he approached the carromata he was asked by our lieutenant what his name was, and he answered his name and surname.

Q. Do you remember the name and surname?

A. I have forgotten.

Q. Continue.

A. After our lieutenant had questioned the policeman so much, the same Lieutenant Pendleton struck a blow at the shoulder
111 of the policeman with the barrel of the gun. From the blows which the lieutenant continued striking the shoulder of the policeman with the barrel of the gun the latter began to feel pain and complain, and as he did not understand what the lieutenant said he started at a natural gait towards our rear. When this policeman started to move behind the carromata, our lieutenant leaned toward one side where the policeman was, and having the gun in his hand he inclined it toward the window of the carromata, with the muzzle toward the street, and at that moment the gun fired, the shot sounded.

Q. What do you mean by the window?

A. The one which is behind the carromata.

Q. Continue.

A. What I saw then was that the policeman fell.

Q. What policeman fell?

A. The same policeman who approached; who was questioned, and who went away.

Q. Who fired the gun; who fired the shot?

A. Our lieutenant.

Q. Was it the gun of Ruiz?

A. Yes, sir.

Q. Which he carried from the quarters?

A. Yes, sir.

Q. Continue your story.

A. When the policeman fell, the lieutenant called for the corporal of the guard. The lieutenant guard, the sergeant guard, the president, nor no one approached.

Q. Whom did the defendant call when the policeman fell? State exactly.

A. The corporal of the guard, the sergeant of the guard, or the presidente.

COURT. All of them, or one of them?

A. He called all of them, and continued to call.

112 Q. Continue.

A. After having called thus, he ordered that a light should be brought.

Q. Whom did he order?

A. He did not name anyone, nor did he order anyone in particular to bring it and Ruiz was the one who brought it; and having returned with the light, Lieutenant Pendleton ordered that it be held behind us. The one who was carrying the light was ordered to carry it by the corner, and as he did not meet anyone he returned, and having returned, the lieutenant ordered that he should hold the light at the place where the corpse was.

Q. Did the one holding the light see the corpse?

A. Yes, sir; because he held the light exactly where the dead man was.

Q. And you saw it?

A. Yes, sir; I also saw it.

Q. Whose corpse was it?

A. The policeman's.

Q. Was he in uniform?

A. Yes, sir; he was in uniform.

Q. And was that policeman who was then a corpse the same who had approached the carromata?

A. Yes, sir; the same.

Q. Continue your story.

A. As we did not meet anyone, after Ruiz came from the corner the lieutenant asked Ruiz, who was carrying the light, if the policeman was dead, and Ruiz answered, "Yes, he is dead."

COURT. Court is adjourned until 9.00 a. m.

THIRD SESSION.

113 The continuation of the present cause was called on the 28th of December, 1905, there being present those present named in the beginning, and the following proofs were presented.

Examination of Urbano Maglinao, continued by the fiscal.

Q. You have stated that Ruiz held the light by the corpse, and the lieutenant asked him if he was dead, and Ruiz answered "Yes;" relate what else happened.

A. After Ruiz had held the light near the corpse he got into the carromata and sat down where he was before as driver; afterward we turned about and drew back a step.

Q. By whose order?

A. By order of our lieutenant.

Q. Continue.

A. Only three of us returned, because one had run away, Gimnasi.

Q. Who had run away?

A. Gimnasi.

Q. When did that occur?

A. After the lieutenant had fired was when he started to run, immediately.

Q. Who were those three who returned?

A. Tecson, Ruiz, and I.

Q. And the accused?

A. Yes, sir.

Q. Did you see the policeman when he received the lieutenant's shot?

A. I did not see the ball touch the body of the policeman, because it was night and the night was dark, but I did see the policeman fall.

Q. In what position was the policeman in relation to the carromata, immediately after he fell?

A. After he had gone a distance of three steps from the carromata was when the gun was fired and at that same moment the policeman fell.

114 Q. In what direction was the policeman looking immediately before he fell; when he was at that distance of three paces?

A. In this direction; towards Cebu.

Q. Now, with relation to the carromata, looking towards the carromata, or with his back to it?

A. With his back to the carromata and looking towards Cebu.

Q. Continue your story of what happened after that.

A. On turning around we passed down another street which is in front of the door of the church of St. Nicolas, and from there we came to the quarters. On arriving at the quarters he called the sergeant of the guard and two other soldiers, although we also, as I have stated, were on guard that night.

Q. Who were the soldiers and who the sergeant of the guard?

A. Grava, Gabato, and Montero.

Q. Why did he call them?

A. He took them together with us.

Q. How many of your constabulary soldiers were there then?

A. There were six of us.

Q. And that was the second time?

A. Yes, sir.

Q. Where did you people go?

A. We turned around toward the place where the corpse was.

Q. And after you were there, what did you do?

A. On arriving at the place where the corpse was and getting out of the carromata called "halt," to which no one answered, after which we walked about sixty yards towards the barrio of Pardo. As no one answered we had to return to the place where the corpse was and the carromata was standing there.

Q. What do you mean "we had;" who?

A. Tecson, Grava, Montero, Gabato, and I. Ruiz was in the
115 carromata.

Q. Where was the lieutenant at that moment?

A. He went with us; he came with us.

Q. What more happened after returning to the place where the corpse was?

A. On arriving there on the return, the lieutenant ordered that the corpse should be loaded into the carromata. After it had been put in the carromata, the lieutenant, the driver, and the corpse were those in the carromata and we went on foot; I, Gravo, Gabato, Tecson, and Montero. Those of us who were on foot, on arriving at a crossroad which there is in the street of el Pardo, turned around a corner and went toward the sea, and afterward we had to cross that same corner on the left side, passing down the street which is in front of the church of St. Nicolas, on the main street. From there we went toward the town hall, and they, the ones who had come in the carromata, had arrived before us, as we had come on foot. Upon arriving near the store, the bazaar "Cebuano" of David Sommer, we stopped, intending to look for those who were in the carromata, and at that moment Ruiz arrived, looking for us, and on coming to the place where we were standing he said, "By order of the lieutenant, we will go to the town hall."

COUNSEL FOR DEFENDANT. I object to what Ruiz said as hearsay.

FISCAL. It is an order transmitted by the lieutenant himself.

COURT. Objection is sustained.

FISCAL. Note an exception.

A. And because of the order which Ruiz had brought, that we should go to the town hall, we went to the town hall, and
116 when we arrived there the corpse was already downstairs at the town hall, where we all gathered together. While we were all standing together at the door of the town hall our lieutenant and the chief of the municipal police were talking, but I do not know what they said, because I did not understand. After they had finished talking, the lieutenant of police began calling all of us by our names, and after he had identified all of our names and had finished calling us we left the door of the town hall, and the lieutenant got into the carromata, making all of us get in. Some were sitting and the others half standing, and going in this way in the carromata we went toward the quarters. Upon arriving, we got out, and only the lieutenant and Ruiz remained in the carromata, because Ruiz drove the lieutenant to the quarters of the commanding officer.

Q. Who was the officer at headquarters where you were that night?

A. The commander of our post was Lieutenant Pendleton.

Q. The defendant, who is now here?

A. Yes, sir; the same.

Q. When you people left the quarters both times that night, were you in uniform or not?

A. Yes, sir; in uniform and armed.

Q. And was Lieutenant Pendleton also in uniform?

A. Yes, sir; in uniform.

FISCAL. Nothing more.

COURT. Cross-examination.

Cross-examination by counsel for defendant:

Q. Who was the policeman who came with the lieutenant to the quarters the first time he came?

A. I did not know him.

Q. Had you ever seen him?

A. I had seen him, but I did not know him.

117 Q. Is there any person in the quarters who knows that policeman?

A. I do not know about my companions, because I have not asked them if they know him.

Q. The first time you left the quarters there were four guns, were there not?

A. Yes, sir; the first time, four guns.

Q. Was Ruiz's gun different from the others?

A. Ruiz's gun was the one which the lieutenant carried, and it was the same as the others.

Q. For what reason, did you say in your answer, that the lieutenant carried Ruiz's gun?

FISCAL. I object to the question as impertinent.

COURT. He may answer.

FISCAL. Note an exception.

A. Because the lieutenant took Ruiz's gun and carried it.

Q. Showing you Exhibit A, state where you placed yourself in the carromata when you left the quarters.

FISCAL. I object to the question for the same reason given in connection with the preceding witness, because of the difficulty of identifying by means of a photograph.

COURT. Objection overruled.

FISCAL. Note an exception.

A. I was sitting at the left of the driver, although not in the seat where one ought to sit by the shafts.

Q. Where were your feet?

A. One foot was outside the carromata and the other was half over the shafts.

Q. Were your feet on the floor of the carromata or on the footboard?

118 A. On one side of the shaft of the carromata I had one foot.

Q. Were you holding to one of the posts with your hand?

A. Yes, sir; I had to hold to one of the posts, because if I had not I would have fallen.

Q. Where was your gun?

A. It was in front of me on my knees, between my knees.

Q. Was it upright?

A. Yes, sir; upright.

Q. Was Tecson sitting on the remaining seat in front of you?

A. No, sir; he was behind the lieutenant on the seat of the carromata.

Q. And where was his gun?

A. It was also upright between his two knees, because he was sitting.

Q. And the lieutenant was sitting on the right side?

A. Yes, sir.

Q. Where did the lieutenant have his gun?

A. It was in front of him and he was holding it with one of his hands.

Q. With which hand was he holding it?

A. With his right.

Q. And where was Gimnasi?

A. On the other side; on the right side of the driver.

Q. Sitting on the railing or on the seat of the carromata?

A. He was sitting the same as I; the same as I.

Q. Was he holding any of the posts of the carromata?

A. He was also.

Q. And where was his gun?

A. It was also in front of him.

119 Q. And where were his feet?

A. One foot was outside of the carromata and the other on one of the carromata shafts.

Q. Did you people come down Calle de Colon coming from the quarters?

A. As the quarters are on Calle de Colon itself, we went from the main door toward the right. Afterward there is a corner where there is another street, toward the left side. We went on that street, in that direction and again toward the right from the bridge.

Q. When the carromata left the quarters, did it go in the road which leads straight to el Pardo, or in the opposite direction?

A. Straight to el Pardo.

Q. And the first street that you took after leaving the quarters was on the left-hand side of the first corner?

A. Yes, sir.

Q. And you went on Calle de Manalili?

A. I do not know that street.

Q. But you took the first street on the left leaving the quarters?

A. Yes, sir; on the left; the first street.

Q. And did you people continue on the same street until you came to Calle de Colon again?

A. No, sir; on arriving at the other side of the bridge we turned to the right and again to the left. On the farther side of the bridge we turned a corner to the right.

Q. Do you mean to say that you followed the street parallel to Calle de Colon until you arrived at the bridge?

A. On leaving the quarters we turned to the left. Afterward to the right and we continued in that street until we reached a
120 bridge; that is to say, after we left the Calle de Colon we turned a corner to the left. Afterward there is a bridge. We crossed it. On the other side of that bridge we again turned to the

right. Soon after passing the bridge we turned to the right until we arrived at a place where there are grass fields and where there is another bridge. After that we turned and went toward the bridge of Fajina, continuing on the street which goes toward el Pardo; but after passing the bridge where there are some grass fields we went toward the left to the road which goes toward el Pardo and afterward we crossed the bridge of Fajina, going in the direction of the place where the policeman fell.

Q. Which was the first bridge that you crossed; the one which crosses the river or the one which crosses the small river?

A. The first bridge that we passed was a small bridge under which the water from the kitchen of our quarters runs.

Q. What was the second bridge that you people crossed?

A. There is another bridge that we crossed, which is the one where there is a grass field, and under which very little water runs.

Q. In what part of the city is that bridge?

A. Near the street which goes toward el Pardo.

Q. Do you mean to say the Calle de Colon?

A. I do not know.

Q. What street do you mean?

A. I do not know what street, because I am not acquainted with it, but we passed there.

Q. How long have you lived in Cebu?

A. Five years.

Q. In what part of the city do you live?

A. In St. Nicolas.

Q. In what part of San Nicolas?

A. In Duljo.

121 Q. What is the name of the street where you live?

A. I do not know it, because I have not read the signboard.

Q. Do you know where the street C. Padillo is?

A. No, sir.

Q. Do you know where the street Calamba is?

A. I do not know that, either.

Q. Do you know where the bridge of the revolution is?

A. I have crossed that bridge.

Q. Did you cross that bridge the night on which the policeman was killed?

A. I do not know what bridge that bridge of the revolution is.

Q. How far do you live from the church of San Nicolas?

A. At some distance; near the church.

Q. Toward el Pardo, or toward Cebu?

A. It is near a barrio, on the right-hand side of the street where the principal door of the church of San Nicolas is.

Q. Is the bridge that you crossed on the same street where the policeman was killed?

A. It is on the same street.

Q. Is the last bridge that you crossed on the same street where the policeman was killed?

A. The same street.

Q. How far did you go on that same street before you people reached the bridge?

A. After we came from the iron bridge, or the bridge painted red, we went in the same street straight to the house of Nicolas Godinez.

Q. But, before arriving at the bridge, did you go to it on the straight road, or did you go to it from the other side?

A. The same street.

122 Q. What distance did you cover before reaching the bridge?

A. I can not estimate it.

Q. Did you pass beside the hippodrome?

A. We passed by there.

Q. Did you pass the cockpit?

A. The cockpit near the theater?

Q. On the side of the theater—did you go there?

A. Yes; in front of the door.

Q. From the front of the theater up to the place where the policeman was killed did you keep the same street?

A. Yes, sir; we went straight up the street which goes to el Pardo.

Q. How far from the theater was the first shot fired?

A. I can not calculate the distance, but I saw that the first shot was fired in the barrio of Pajo.

Q. How far from the hippodrome?

A. According to my estimate it must have been several meters to the monument on the plaza. [In the judgment of the fiscal, 365 feet; in the judgment of the court and defense, 500 feet.]

Q. Was any shot fired between the theater and the hippodrome?

A. The first shot which was fired into the air was in the place where the barrio of Pajo is, and the second one was on the same street, but in front of a mango tree.

Q. But was the first shot fired between the theater and hippodrome or not?

A. Before arriving at the hippodrome.

Q. Did the lieutenant load the gun?

A. He himself loaded it.

Q. How long before firing the first shot did he load the gun?

A. What he did was to open the gun and take out the empty

123 shell, and I knew that by the noise. It must have been about three minutes.

Q. Where did he get the first cartridge to load the gun the first time?

A. From Tecson.

Q. What movements are necessary to load the gun?

A. Less than a minute.

Q. But what movements are necessary to load the gun?

A. The necessary time is, to put the gun muzzle down, open it and then the time necessary for drawing the cartridge and reloading it.

Q. Did he close the gun?

A. Yes, sir.

Q. Does that make much noise?

A. Yes, sir.

Q. Can you hear from here to that door?

A. According to the way of closing it; because if it is closed hard the sound is loud, but if closed slow the sound is not so loud.

Q. But, ordinarily, the act of closing the gun makes a loud noise, when it is closed quickly?

A. Yes, sir.

Q. In what position did Mr. Pendleton have the gun when he fired the first shot? Did he fire toward the front of the carromata, toward the back, or toward the side?

A. The first shot was fired up into the air, and made a hole in the roof of the carromata.

Q. Show the court in what way the defendant was holding the gun in his hands.

A. He was holding it in both hands, above and below, and on opening the trigger he fired. [The witness indicates.]

124 Q. Did he have his arms extended?

A. Not stretched out very far. [The witness indicates.]

Q. The gun was near Gimnasi?

A. No, sir; in front of him.

Q. After having fired the shot, how long did he wait before taking out the shell from the gun?

A. I believe that a minute must have passed, because after he fired the first time, as Gimnasi was in front of him, he took a cartridge and then had to take out the shell.

Q. Where was the empty shell put?

A. After he opened the gun the cartridge flew out, and I believe it must have fallen inside the carromata.

Q. Did you get the empty shell from there?

A. No, sir; I did not touch it.

Q. Did you see anyone get it?

A. No, sir; I did not see it.

Q. How far from the hippodrome were you when the second shot sounded?

A. According to my estimate, it was about one hundred yards from the place where he fired the first shot until he fired the second.

Q. Half the distance between the hippodrome and the place where the bridge is?

A. No, sir; not that far.

Q. Was it nearer the bridge than the hippodrome?

A. Nearer the hippodrome than the bridge.

Q. Have you been in the place where the thing occurred after that day when the policeman died?

A. I have not returned there up to the present.

Q. Had you been there before?

A. I passed by there once coming from the mountain.

Q. What is the name the people call that place where the
125 thing occurred?

A. According to what they say; according to what I have heard about that house, the owner is Nicolas Godinez; but I am not positive of it, because I have not asked him nor do I know him.

Q. Did anyone tell you that night that that house belonged to Nicolas Godinez?

A. No one told me that except my companions. A soldier told me that house belonged to Nicolas Godinez.

Q. Did he tell you that that same night?

A. The following morning.

Q. How did you know of what house he was talking to you that morning?

A. Because that companion of mine, the soldier, told me that that house which is near the place where the occurrence took place was the house of Nicolas Godinez.

Q. Showing you Exhibit B, state if this is the place where the death of the policeman occurred. [Counsel for the defense shows witness a photograph.]

FISCAL. I object to the presentation of this exhibit because it is not duly identified.

COURT. The objection is overruled.

FISCAL. Note exception.

A. In regard to this I can not state whether it is or not, but if I go to the place personally where the affair occurred I would know it well.

Q. State if you know any house in this photograph. Do you remember where the corner of the church is?

A. It appears that the form is somewhat similar, but I can
126 not identify it. I can not say whether the view is taken just as the street is, because I have never seen it in the way this is.

Q. Do you not remember the street which crosses, which passes the church when you people left the corpse?

A. There is a crossroad, and in front of it there is a large house, in front of the church; and there is where we passed.

Q. Was there a light burning on this street which crosses in front of the door which is at the side of the church?

A. In front of a chapel on the street there was a light.

Q. Where are the street lights?

A. There was a lantern near the bridge which was lighted.

Q. Was there a lantern on the corner?

A. I did not observe whether there was one or not.

Q. Was there a lantern near the place where the policeman was killed?

A. There was a light close behind us.

Q. Where was that light? Near the house of Godinez which you have mentioned?

A. The lantern was behind our carromata.

Q. But how far from the house of Godinez?

A. I can not calculate the distance, because I did not see the entire lantern, but only the light which was inside the lantern; but the place where it was I did not see.

Q. But was the lantern on the same street; on the same side of the street?

A. Yes; on the same street and in the same line.

Q. Was there a paling fence on both sides of the street?

A. Yes, sir; because it is a street.

Q. Was the night dark or light?

A. Dark.

Q. Does this photograph resemble the place where the act
127 occurred?

A. It resembles it, because it is a street.

Q. When the lieutenant fired the gun the second time did he immediately recharge it?

A. After having taking out the empty shell.

Q. Where was that shell put?

A. I do not know where it was put.

Q. Do you not know whether it was in the carromata or not?

A. I do not know, because after having fired the gun he opened it and the shell fell out.

Q. You did not see anyone pick up the shell?

A. No, sir; I did not see it.

Q. Describe the policeman who was killed.

A. I can not estimate his height.

Q. Did you not see him clearly?

A. Yes, sir; I saw him.

Q. Did you not see him when he was standing at the side of the carromata?

A. Yes, sir; I saw him.

Q. And was he holding the railing on the driver's seat by one of his hands; the place where Ruiz was?

A. I did not see his hand.

Q. Showing you Exhibit C, state if he was a man of this size.

FISCAL. I object to the question, because the height of the dead man can not be identified in this manner.

COURT. Objection is sustained.

Q. While the policeman was standing there was he near Gimnasi or the other?

128 A. Yes, sir; he was nearer Gimnasi.

Q. And was his head as high as Gimnasi's shoulder?

A. No, sir; because the carromata in which we were was rather high.

Q. How much below Gimnasi's shoulder did the head of the policeman reach?

A. According to my estimate the head of the policeman must have been near the waist of the shoulder of Gimnasi.

Q. About how high on Ruiz's body did the head of the deceased reach?

A. I believe that it was also up to his waist, because Ruiz was sitting down.

Q. Were the shafts of the carromata as high as the policeman's waist?

A. The height of the shafts must have been about that.

Q. Examine Exhibit D and state if it represents the back of the carromata exactly.

FISCAL. I object to the question, because it is an exhibit which has not been admitted nor identified.

COURT. Objection is overruled.

FISCAL. Note an exception.

A. I can not state whether this is a representation of the back of the carromata, because when the affair took place it was night; I could not observe. And in the second place I did not look at the back of the carromata. Now, in regard to the window, its position I can not state precisely, nor the shape of the cloth or wood which forms this window.

Q. But in regard to the window, does this represent the carromata which was used that night, faithfully and correctly?

A. The shape is the same.

Q. Is this window similar to the one out of which the lieu-
129 tenant fired?

A. Yes, sir.

Q. When did the lieutenant load the gun after having fired the second time?

A. He loaded it immediately after having taken out the empty shell.

Q. Had you not passed the bridge?

A. He loaded it while the carromata was going towards the bridge.

Q. But had you passed the bridge or not?

A. According to my observation, because I heard the sound of the gun, he loaded it while the carromata was in motion and the gun was already loaded when we passed the bridge.

Q. As it was very dark, you could not see in the carromata that night?

A. Being inside of the carromata, persons could not be seen who were passing under the shade of the trees, and for that reason persons could not be seen.

Q. And you only knew when the gun was loaded by the sound?

A. Yes, sir; and besides because he snatched the cartridges.

Q. But you could not see him take the cartridges from the other constabulary men?

A. He took the cartridge from two constabulary men.

Q. How far was the policeman from the carromata when you first saw him?

A. I saw him because he was near the carromata when he approached.

Q. How far from the carromata?

A. It must have been one yard from the place where I was sitting to the head of the policeman.

Q. When you saw him the first time?

A. When I saw him approach.

130 Q. Can you state from what direction he came?

A. No, sir.

Q. Then when you saw him he was near Gimnasi?

A. Yes, sir; he was near him.

Q. And then he went around behind the carromata?

A. Yes, sir; because the lieutenant had struck some blows with the barrel of his gun.

Q. When did the lieutenant pull the trigger of the gun; before striking the blows or afterward?

A. When the lieutenant struck the shoulder of the policeman with the barrel of the gun, the lieutenant had not yet touched the trigger of the gun, but when the policeman started away, after having received the blows struck with the barrel, the policeman started toward the window of the carromata and then the lieutenant turned half around toward the left, leaning the gun on the window of the carromata, and pointed it down and fired.

Q. Is that when the policeman fell?

A. Yes, sir.

Q. Was the policeman walking or running when he started away?

A. At an ordinary gait.

Q. Show how the lieutenant was holding the gun when he fired the shot.

A. The window being behind him, the lieutenant pointed the gun, the barrel, down.

Q. Then did he turn about toward the left or the right?

A. Toward the left, because the movement was easier.

Q. On which right side, toward the back of the driver's seat?

A. His right hand did not touch any part of the carromata, because he was holding the gun in the air, but he placed him-

131 self at the left-hand side of the window with the gun in his hand.

Q. Then did he rest the gun on the window or on the seat itself?

A. The gun was touching the back of the little window.

Q. Was his left arm outside of the carromata window, as you have just indicated?

A. Yes, sir; because I saw him in that position.

Q. Was Gimnasi in the carromata when the shot was fired?

A. Immediately after he fired was when Gimnasi jumped out of the carromata and started to run; at that same moment.

Q. You can not state whether it was immediately before or immediately after the shot?

A. Instantaneously; almost at the same time. On hearing the sound of the gun was when he jumped out of the carromata.

Q. Where did he go?

A. According to what I saw, I believe he started to run, going in front of the horse, and afterward he went toward el Pardo.

Q. Why did he start to run, going in the direction of the street of el Pardo?

A. Because he passed near the horse, a short distance from him, going in that direction.

Q. After he had passed near the head of the horse did you again see him?

A. The last moment when I saw him was when he arrived at a distance of one yard from the horse's face, but afterward I did not see him because it was dark.

Q. Did you see a policeman fall?

A. Yes, sir.

132 Q. And did he fall at the moment the shot was fired, without walking farther?

A. Immediately after the shot, on taking the first step, was when he fell.

Q. Did he fall face down?

A. Face down.

Q. Did you see the policeman distinctly before the shot was fired?

A. I saw him at the moment it was fired, and when he fell I saw his entire body.

Q. Was he walking at a natural gait?

A. Yes, sir: at an ordinary gait.

Q. And walking toward Cebu?

A. Yes, sir: in the direction of Cebu.

Q. Was he holding his hand on his revolver?

A. No, sir.

Q. Did he have a revolver?

A. Yes, sir.

Q. Did he have it in front or behind.

A. At his side.

Q. How was the policeman walking before the shot: with his hands on both sides or not: state the manner.

A. He was moving his hands naturally.

Q. Did you see that distinctly?

A. Yes, sir: I saw when he left the carromata he went away moving his arms.

Q. Was he moving his arms much?

A. No, sir: naturally.

Q. In other words, you mean to say that he was walking in a natural manner?

A. Yes, sir: in an ordinary manner.

JUDGE. Court adjourned until 3.00 p. m.

133 FOURTH SESSION.

The continuation of the present cause was called at 3 p. m. December 28, 1905, there being present the persons named in the beginning, and the following proofs were presented.

Cross-examination of Maglinao cont'd by counsel for defense.

Q. When Ruiz got the light, where did he go with it?

A. When Ruiz came with the light from a house where he got it he came to the carromata: afterward the lieutenant ordered Ruiz to hold the light behind us—that is, behind the carromata—and he did so, going beyond a place near the corner.

Q. Is that the corner near the church?

A. Yes, sir.

Q. On which side of the carromata did the light pass: on the right side or left side?

A. On the right side.

Q. Did the lieutenant order him to return, or did he return of his own will when he arrived near the corner?

A. He returned because he was afraid: because he had already come some distance.

Q. What kind of a light was that?

A. A little lamp.

Q. Did you say the lantern was lighted?

A. Yes, sir: I saw that it was lighted.

Q. Could one see to the corner by means of that lantern?

A. No, sir.

Q. From the carromata could you see the corpse?

A. Yes, sir: because it was near it.

Q. If the corpse could be seen without the little lamp, why did Ruiz bring it?

134 A. He brought the light, because the lieutenant ordered him to hold a light behind us.

Q. Did you see two policemen in front of the carromata immediately after the shot?

A. Just as soon as the policeman fell, I saw two other policemen who started to run.

Q. But did he hold the light above the corpse: higher up than the corpse, so that it could be seen?

A. He was at a short distance from the corpse: at a distance of two or three feet.

Q. And did the defendant ask Ruiz if the policeman was dead?

A. Yes, sir; he asked and Ruiz answered yes, that he was dead.

Q. The defendant was nearer the corpse than you were in the carromata, was he not?

A. Yes, sir; he was nearer the corpse than I, because he was in the carromata at the little window.

Q. But did you see the policeman when he fell and did you know that he was dead?

A. I knew the policeman was dead when Ruiz held the light and, besides that, the policeman did not move any more.

Q. And the defendant was able to see that as well as you, was he not?

A. Yes, sir; he saw it.

Q. What did the defendant say after asking if the policeman was dead?

A. He did not say anything more; we left that place and turned about.

Q. To the right or left?

135 A. To the right.

Q. And on turning about, did you pass to the left of the corpse?

A. Yes, sir; because we had to back up a step.

Q. Upon returning to the quarters, do you know through what streets you passed?

A. We had to cross a street toward the right, and on passing the church of San Nicolas we again turned to the left to go down a straight street toward a bridge painted white. Coming from the place where the policeman fell dead, we went toward a place where there was a chapel; there was a street and there we turned to the right, and on reaching the corner of a wall where there is a corner, we had to cross another street toward the left, which street goes directly toward a bridge painted white.

Q. And did you continue in that direction?

A. Yes, sir; we went from that place directly to the church of the Recoletos.

Q. And from there to the plaza of the townhall?

A. Yes, sir; straight to the townhall.

Q. And after turning to the left, directly to the quarters?

A. Those of us who were on foot, or those who were in the carromata?

Q. I am asking you now about your return from the place where the death occurred to the quarters—where did you people go then—not to the townhall, but to the quarters?

A. We turned a corner where the bazaar of David Sommer is and then along that street on the left side toward the quarters.

Q. And when you people returned from the quarters to get the corpse, who put the corpse into the carromata?

136 A. I did not notice; at least I did not see who picked up the body to put it into the carromata, but I was one of the four. I did not observe because it was night.

Q. Was it so dark that the faces could not be seen?

A. Yes; the night was dark.

Q. What part of the body did you pick up?

A. One of the feet.

Q. Was the body cold then?

A. Yes, sir; so much so that I was afraid to take a hold of it.

Q. Was it stiff?

A. No; it was limber.

Q. Were you in the office of the fiscal on December 1st?

A. I do not remember what day I came.

Q. But you can remember that you were in the office of the fiscal the day after the policeman was killed, about 6.00 p. m.?

A. I do not remember.

Q. Do you not remember that Gimnasi was in that office with you and Ruiz?

A. I do not remember.

Q. When you were in the office of the fiscal, were the empty shells, three in number, shown to you?

A. Yes, sir; I remember that one day three empty shells were shown me.

Q. Was that shortly after the death of the policeman?

A. It was not long afterward.

Q. How many times were you in the office of the fiscal after the affair in question?

A. I was there four times.

Q. When was the last time?

A. This hearing.

137 Q. When? Before the hearing?

A. That of yesterday?

Q. When?

A. The last time before yesterday that the fiscal told me that we should come; the 27th day of this month, and to-day, which is the second day of the hearing.

Q. Do you not remember the first time you were in the office of the fiscal?

A. I do not remember.

Q. Do you know how many times you have related this affair to the fiscal?

A. The fourth time was the day when he told me that I should come.

Q. Was Gimnasi in the quarters when you returned the first time?

A. Not yet.

Q. Was he when you returned the second time?

A. The last time that we returned I saw him there, but the lieutenant was no longer there; Gimnasi was.

Q. When Gimnasi jumped out of the carromata, did he immediately carry his gun with him?

A. Yes, sir; he carried it.

FABIAN RUIZ, recalled by petition of the defense.

Recross-examination by counsel for defense:

Q. When the policeman was standing beside the carromata, was his hand on the railing of the driver's seat, or was he holding the post?

A. On one of the shafts.

Q. When you went toward the place where the policeman was, was he already dead?

138 A. He was already dead.

Q. Was he cold or not?

A. I did not touch him, but he did not move or speak a word.

Q. That is all.

Redirect examination by the FISCAL:

Q. You spoke of this gun as a constabulary gun and said that the defendant took it and that with it he committed the crime; will you tell us what relation it has with this gun which I show you?

A. This is the same gun which the lieutenant took from me and it is mine.

FISCAL. I offer the gun as proof.

COUNSEL FOR DEFENSE. I am going to ask some more questions.

Q. Is the gun in the same condition that it was in when it was fired, or has any change been made in it?

A. It is the same condition as it was before.

Q. Has it not been cleaned?

A. I cleaned it on Saturday, because an inspection of arms was to be made.

Q. The Saturday after the death?

A. Yes, sir.

COURT. The gun is admitted as proof.

MARCOS GIMNASI, resident of Cebu, 18 years of age, single, constabulary soldier, being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. How long have you been a constabulary man?

139 A. Since the month of June.

Q. Were you a constabulary man during the past month?

A. Yes, sir.

Q. On November 30th, the official holiday of Thanksgiving, were you a constabulary soldier?

A. Yes, sir.

Q. Do you know the defendant?

A. Yes, sir.

Q. What is his name?

A. Lieutenant Pendleton.

Q. Who was the commanding officer in charge of your quarters in Cebu on November 30th?

A. Mr. Pendleton.

Q. Did you see that lieutenant on the night of the official holiday?

A. Yes, sir; I saw him when he went to the quarters, about 2.00 a. m.

Q. How did he go there?

A. He went in a carromata.

Q. What did he do?

A. When he arrived, what he did was to order the guard to be called and he took four of us.

Q. Who?

A. Maglinao, Ruiz, Tecson, and I.

Q. How was the lieutenant dressed; in uniform or not?

A. In uniform.

Q. And how were you four dressed?

A. In our official uniforms.

Q. Were you people armed?

A. Yes, sir.

Q. What arms did you have?

A. Guns and ammunition.

140 Q. Who carried guns?

A. The four.

Q. And the lieutenant?

A. Although the lieutenant did not carry a gun, he took Ruiz's gun, because Ruiz was the driver.

Q. Did you get into the vehicle?

A. Yes, sir; Ruiz, Maglinao, Tecson, the lieutenant, and I.

Q. Where was the last place that the carromata stopped?

A. Near the church of San Nicolas; behind it.

Q. What happened there? Relate it.

A. The first thing that happened was the following: We were in the carromata, and on arriving at the place, Pajo, our lieutenant fired a shot into the air and afterward he fired another shot, just before reaching the bridge. The carromata went on and the lieutenant's gun was recharged, and at that moment, the carromata being in motion, the lieutenant punished me and pointed the gun which he had at my breast. When Lieutenant Pendleton punished me he gave me a kick on the breast with one of his feet, while the other foot was on the floor of the carromata; and, because of the kick which he gave me I leaned back, as I was sitting beside the driver and behind him. When he punished me, as the kick which he gave me in the stomach pained greatly, I said to him, "Sir! sir! do not punish me, because I have not done anything wrong." And, besides, I was afraid that the gun would be fired, because it was loaded. Although I did not believe that he would shoot me. When he had punished me for quite a while, striking me repeatedly, he touched me twice with the end of the gun in the stomach, and I said to him, "Sir! do not punish me," and he said "God damn Gimnasi; a first-class rascal." The carromata stopped about 20 yards from the place where I re-

141 ceived the last blows. Afterward the lieutenant asked the driver, Ruiz, what place that was, and as Ruiz answered that it was San Nicolas, he ordered him to stop the carromata, and less than a minute had passed when a policeman appeared—and approached. When the policeman approached, the lieutenant asked who it was, and the ploiceman answered "a policeman, sir." The lieutenant asked him his name twice and then Ruiz asked the policeman his name by order of the lieutenant, and then the policeman

answered Leoncio Unabia. After having answered, the lieutenant struck the policeman two or three blows with the barrel of his gun, saying, "God damn, God damn." After the policeman started away towards the rear of the carromata, while I remained leaning face upward, because the lieutenant had one of his feet on my stomach. After the policeman had gone a little distance from the carromata was when the lieutenant pointed the gun down and then a shot was heard, although I did not see the ball strike the policeman, because of the position in which I was lying, with my face up. At the moment of the shot was when I jumped out of the carromata and started to run. Having run a certain distance I saw a policeman, a companion of the dead man; I passed in front of the horse's head and went toward a fence and side of a street and I came down toward Cebu.

FISCAL. Nothing more.

Cross-examination by counsel for the defense:

Q. Who came to the quarters with the accused?

A. Policeman.

Q. Did you see that policeman?

A. Yes, sir; I saw him.

Q. What is his name?

A. I did not know his name.

Q. Did you see him afterwards?

A. I have not seen him again.

142 Q. Had you seen him before?

A. No, sir.

Q. Did he talk to anyone in the quarters?

A. He did not talk.

Q. Did he remain in the carromata until the constabulary men were ready to start?

A. When the lieutenant arrived with the policeman in the carromata a sufficient length of time elapsed for the policeman to deliver the carromata to the man at the quarters, saying, "Here is your lieutenant," and less than two minutes had passed when the policeman went away leaving the carromata without a driver.

Q. How long was the carromata there before the lieutenant got out of it, after the policeman had gone away?

A. I believe that ten minutes must have passed, because what he did was to awaken the guards who were sleeping, and after, he ordered them to fall in line; after they had fallen in line he selected four of us, and in doing all of this about ten minutes must have elapsed.

Q. Did he select those four by their surnames?

A. I do not know that he selected by calling the names and surnames, but the four who were awake, with the exception of the corporal of the guard, were those whom the lieutenant took.

Q. How many did the accuse' not awaken, because all were already awake?

A. The four of us were awake, because at that hour the sentinel had to come in and Maglinao, Tecson, Ruiz, and the corporal of the guard, and the one who was on guard were awake.

Q. Was the lieutenant in command of your companions?

A. Yes, sir.

143 Q. Where is that place called Pajo?

A. There on the street called el Pardo.

Q. On what part of el Pardo?

A. On the left side, going toward the barrio of el Pardo.

Q. Can you fix the location of Pajo more exactly?

A. I can not state the surroundings exactly, nor the natural landmarks where that place is, but I would recognize it by going there personally; but I do not know who are the owners of the houses in that place.

Q. Do you know where the English club is?

A. I do not know where it is.

Q. Do you know where the theater is?

A. Yes, sir; on the street of el Pardo.

Q. Is Pajo near the theater on this side or on the other side?

A. Going in that direction, it is on the other side of the theater.

Q. On the other side of the cockpit?

A. I do not know where the cockpit is.

Q. Do you know where the hippodrome is?

A. I do not know where the new one is; I have never been there.

Q. Do you know where the bridge of the revolution is?

A. I do not know where it is exactly. I do not know whether it may be that iron bridge which is there.

Q. Do you know where the bridge is which crosses the river Guadalupe?

A. That is the bridge of Fajina.

Q. Is Pajo on this side or on the other side of that bridge, going toward el Pardo?

A. Pajo is on this side.

Q. How far on this side of the bridge?

144 A. I can not estimate the distance between Pajo and the bridge.

Q. How is it that Pajo is the only part of that street of El Pardo you can tell anything about?

A. Because they say that Pajo is on the left side, going from the theater toward El Pardo.

Q. But how do you know this about Pajo and you do not know other places on the street of El Pardo away from the theater?

A. I only know that the place Pajo is in that place, because sometimes I pass there coming from the mountain, and I heard it said that that place was Pajo; and, besides, according to public rumors, there are some houses of ill-fame there.

COURT. Court is adjourned until 9.00 to-morrow.

FIFTH SESSION.

The continuation of the hearing in the present cause was called on December 29, 1905, there being present the persons named in the beginning, and the following proofs were presented:

Continuation of the cross-examination of Gimnasi by counsel for the defense.

Q. How long have you been living at Cebu?

A. Five years.

Q. Have you lived in the same part of the city all this time?

A. In regards to the house where I live, it is the same where I continued living. Now, as a soldier, I have been in the mountains.

Q. Where is your house?

A. Near the garden of the deceased Mrs. Climaco, in Cogon.

145 Q. Is it on the east or west of the river Guadalupe?

A. Going toward the camp, it is on the right side.

Q. Have you any relative among the policemen of Cebu?

A. None.

Q. How many times have you been in the place where the policeman was killed?

A. I do not remember the number of times I have passed by that place, because as a soldier I am always coming and going.

Q. The constabulary are accustomed to pass by that place frequently; they go through that road, do they not?

A. Last year, 1904, when we were stationed at the jail, we were in the habit of passing that place sometimes, but since we have been stationed in the mountain, very seldom.

Q. But are you not stationed in Cebu, and not in Camp Walker?

A. Formerly I was stationed in Camp Walker, about a year; but now we are here in Cebu.

Q. How did you fix the time that the lieutenant went to the quarters at 2.00 a. m.?

A. I noticed the hour when he arrived, because it was precisely my time to go on guard.

Q. At what hour is the guard relieved?

A. The change is made at twelve and two, and I went on at two.

Q. Were you sitting in the carromata face to face with the accused, the defendant?

A. Yes, sir.

Q. Look at Exhibit A. Were you holding the posts of the carromata with you' right hand or with your left hand?

A. Although it is true that I was holding one of the posts with my left hand, I do not know whether this is the same carromata or not.

146 Q. And you had your gun between your legs, and was holding the post with your right hand?

A. Yes, sir.

Q. Which foot did the accused put on your body when he pushed you over towards the driver?

A. The left foot.

Q. Had you had any trouble before that with the defendant?

A. No, sir.

Q. When the accused fired the first shot near Pajo, where did the shell go to?

A. I do not know where the empty shell went, because after he fired the shot he reloaded the gun.

Q. Did you pick up the shell from the floor of the carromata?

A. No, sir.

Q. Do you know where the shell went to the second time he fired?

A. No, sir.

Q. Did you not pick it up?

A. No, sir.

Q. Was the night light or dark when the policeman was killed?

A. It was a dark night, but I do not know whether there was a moon or not.

Q. And was the place where the death occurred very dark?

A. Dark.

Q. How far were you from the horse's head when you saw the policeman running?

A. I can not estimate how many yards from the place where I met the policeman running, but I met them near the fence. I passed about ten yards from the horse's head.

Q. Did you and the policeman run toward the same side or one behind the other?

147 A. One went ahead of me and the other behind and I in the middle.

Q. How far from you were they running?

A. I can not be sure of how many yards, but I know I was between the two.

Q. Could you touch either one of the two with your hands?

A. No, sir.

Q. Did you speak to them?

A. No, sir.

Q. How long did you continue running in the manner you have stated?

A. I can not state how long I was running.

Q. At full speed?

A. I do not know if they were running at full speed, but I was running as fast as possible.

Q. Why did you start to run?

A. I started to run and jumped from the carromata because of the fear I felt, because I do not wish to say that I believe that he would shoot me; I ran because of the position I was in when the lieutenant had one of his feet on my stomach and was threatening me with the muzzle of the gun when it was loaded.

Q. When you ran were you afraid that the lieutenant would shoot you?

A. Yes, sir; I was afraid, not because he might shoot me, but afraid that the gun might be discharged.

Q. When you started to run the gun had just been fired, had it not?

A. At the moment it was fired I jumped out of the carromata and started to run.

Q. How far did you and the policemen run in front of the first corner of that street?

148 A. I can not state exactly; I can only state that I saw them start to run and that I was between the two.

Q. Why did you not tell the policeman what had occurred?

A. I did not tell that policeman whom I saw when I ran near the place where the act had occurred, but when I passed the street, going toward the quarters, on arriving at the street where Cosing's warehouse is, I met a policeman and told him that he should look out for a carromata which had no light and that he should not order it to stop, because there was a lieutenant who had just killed a policeman.

Q. Why did you not tell those two policemen who ran with you?

A. I could not tell because of the punishment I had received from our lieutenant, and before that affair had occurred only one policeman approached the carromata, and when I jumped out of it, because of my fear I could not tell about it, and besides I saw that they were running and I started to run the same as they.

Q. Did you leave the policemen when you reached the first corner or afterward?

A. When I was between them I had already reached the first corner, but I continued running on that street toward the seashore.

Q. Did the policemen ask you what occurred and who fired the shot?

A. No, sir.

Q. Did you know those two policemen?

A. No, sir.

Q. Could you see their faces?

A. No, sir; because the night was dark; I saw their bodies.

Q. Could you see the shape of their clothes?

149 A. Yes, sir; I saw their uniforms as well as helmets.

Q. Did you see their revolvers?

A. No, sir; I did not observe them, because we were running, but I saw clearly only the hat and the uniforms.

Q. If you were afraid, why did you not separate yourself instead of leaving them?

A. I started to run, or jumped out of the carromata through fear of our lieutenant, because he had punished me, and, besides, I started to run toward the quarters.

Q. When you left the policemen, were they running toward El Pardo?

A. I saw them running, but I do not know whether they continued running, because when I no longer saw them I can not tell anything about what they did.

Q. Where did you go when you left the policemen?

A. When I left those policemen, who started to run, I took a street going toward the seashore and continued running, and on arriving at the main street of San Nicolas I came here towards the quarters, and on arriving at Cosing's warehouse was where I met the policeman whom I told that he should look out for a carromata which had no light and that he should not stop it.

Q. The street on which you were running towards Cebu is the same one on which Cosing's warehouse is; where you met the policeman to whom you talked?

A. Yes, sir; it is the same street.

Q. Do you know where the market of San Nicolas is?

A. Yes, sir.

Q. And the school is on the other side of the market?

A. I do not know where the school is.

Q. Do you know where the corner church is, on the other side of the market?

150 A. I do not know where that corner is, because precisely I can not remember the corners, because I do not know anything about them. Now in regard to the streets where I passed I can remember them, if I am sent there.

Q. Do you know where the church of San Nicolas is?

A. Yes, sir.

Q. Do you remember a large house which is on the other side of the church on the side of the street in front of the market on that road which goes to Cebu?

A. I do not know where that house is, but there are many large houses in San Nicolas.

Q. Did you see the lights in the house on the other side of the church of San Nicolas?

A. No, sir; I did not see.

Q. Did you see any policemen in the house near the church of San Nicolas?

A. No, sir: I did not see any policemen; only where Cosing's house is.

Q. Were you running all of the time from the time you left the policemen until you met the other policeman by Cosing's house?

A. During the time which elapsed from the time I jumped out of the carromata, up to the house of Cosing I stopped sometimes, but after I rested, I again ran, but I could not state the precise spots where I stopped.

Q. At what hour did you return to the quarters?

A. I can not state the hour when I arrived there, but it was only a few minutes, twenty more or less. I went on guard, because it was my turn; it was three o'clock and afterward the four, they relieved me, because that is the hour for the relief.

151 Q. How was the defendant holding the gun when he fired the first shot?

A. The first shot that he fired he was holding the gun up; he opened and loaded it; after it was loaded he fired up, making a hole in the roof of the carromata; he immediately recharged it, before reaching the bridge of Fajina, and also fired into the air. After having fired the two shots he opened it and again loaded it.

Q. Indicate to the court what movements the accused made and how he loaded the gun before firing the first shot?

A. Coming from the quarters, we were inside the carromata and the lieutenant had Ruiz's gun; I was sitting behind the driver, headed this way; first he held the gun down in an inclined position, opened the chamber, loaded it, and held it up; for instance [the witness goes through the motions].

Q. Now show how he aimed the gun when he fired at the policeman; the back of the chair where you are sitting, being the window of the carromata.

A. The lieutenant being seated on the right of Tecson did this way, for instance [the witness indicates]. The gun being loaded he turned around from the right to the left and pointed down through the window in the position of aiming.

COUNSEL FOR DEFENSE. Nothing more.

Redirect examination by the FISCAL:

Q. What was the reason that the lieutenant struck you?

A. Because I tried to stop him from aiming when he was going to shoot in a place where there are many houses, and I said to him, "Sir! not there, because there are many houses." And he said, "God dam rascal. Gimnasi."

152 FISCAL. Nothing more.

Recross-examination by COUNSEL FOR DEFENSE:

Q. What place was that where you told him not to shoot?

A. I do not know what place that was, but I know that it was a place where there were many houses.

Q. Is that place between the bridge and the place where the policeman was killed?

A. Yes, sir; on the other side of the bridge.

Q. How far from the bridge?

A. I could not calculate the distance from the bridge where I tried to stop him from doing that because the night was dark and the carromata was in motion.

Q. Was it near the church?

A. I could not observe whether it was behind the church. I only observed that there were many houses.

COUNSEL FOR DEFENSE. Nothing more.

After the testimony of this witness, referring to his health, the fiscal pleaded the court to transfer the hearing of this cause to the second of January, 1906, and the counsel for the defense having stated

to the court that he had no objection, the court ordered that the hearing of this cause be adjourned to the second of January, 1906, until 9.00 a. m.

SIXTH SESSION.

The continuation of the hearing of the above-entitled cause was called on January 2nd, 1906, there being present the persons named at the beginning, and the following proofs were presented:

153 LORENCIO GRAVA; 38 years of age; married; constabulary soldier, being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. Since when have you been a constabulary soldier?

A. Since September 3, 1905.

Q. Were you a constabulary soldier in the month of November of that same year, 1905?

A. Yes, sir.

Q. November 30th of that year where were you stationed?

A. I was on guard at the quarters.

Q. In what quarters?

A. In the quarters at Parian.

Q. In the town of Cebu?

A. Yes, sir.

Q. Who was the commanding officer of that post that night?

A. The commanding officer was Mr. Pendleton.

Q. The defendant?

A. Yes, sir; the same.

Q. Did you see your commanding officer on the night of November 30th?

A. I saw him because he was there.

Q. How many times did you see him in the quarters that night?

A. Twice.

Q. Tell about the first time you saw him.

A. The first time he went to the quarters in a carromata with a policeman; when he arrived at the quarters he looked for the sergeant of the guard. As I was the sergeant, when he looked for me I went to him, as corporal of the guard; and being in his presence he gave me some directions as to duties in the care of prisoners.

Q. After he gave you those instructions, what more did he

154 say to you?

A. After having given me those instructions he went up into the quarters and went about looking at all the soldiers who were inside. After he came downstairs he looked for all the guards who were there, ordering them to come down to the same place. When they had all collected he selected those he wanted to take with him.

Q. Whom did he select?

A. Maglinao, Ruiz, Tecson, and Gimnasi.

Q. What did he do afterward?

A. After he had selected those four guards, he made them get into the carromata, telling them to take him to the commanding officer's house.

Q. Whom did he tell that they should take him?

A. Ruiz and his companions.

Q. Was there a driver in the carromata where the four were?

A. A policeman had come as driver, but he told him to return.

Q. When he went away, did he go with the four?

A. The lieutenant went away with the four men he had collected, in the carromata, one of them, Ruiz, acting as driver.

Q. Were the constabulary men whom the defendant had selected armed?

A. Yes, sir.

Q. How armed?

A. With guns.

Q. Did Ruiz carry a gun or not?

A. Yes, sir; but when he was driving his gun was held by Mr. Pendleton.

Q. When was the second time that you saw him?

155 A. I believe it was 3.30; I am not quite certain when they returned to the quarters. Afterward he sent for me, as I was sergeant of the guard. He told me to prepare my soldiers, and as he had no men he took Montero and Gabato and he told me to go along with the soldiers. On leaving the quarters we went behind him.

Q. How did he go?

A. In the carromata; the rest went on foot.

Q. What more; where did you go?

A. We went to San Nicolas, and on arriving there and being in the street El Pardo, we found a dead policeman.

Q. What did the lieutenant do then?

A. On arriving the lieutenant ordered that this corpse should be picked up and put in the corromata. After the corpse was in the carromata he ordered that it be taken to the townhall and he went in the carromata itself. When we arrived at the townhall the corpse was taken out. As we were coming behind it, Ruiz came to meet us and met us in the street where Kipp's bar is.

COURT. The last part of the answer is stricken out and only what the witness himself saw shall remain.

Q. Where did you meet Ruiz?

A. In front of Kipp's bar.

Q. What more; where did you people go?

A. To the townhall.

Q. And after you were in the townhall what did you do?

A. When we arrived at the townhall we went to the lieutenant, who told us we should wait for him. After we had been waiting for him a short time, he ordered us to get into the carromata, and after arriving at our quarters Mr. Pendleton went away to the commanding officer's house.

156 Q. On leaving the townhall to return to the quarters, did you go in the carromata or on foot?

A. All of us got into the carromata: the defendant also.

Q. Did you hear any conversation that night between the defendant and the lieutenant of police of Cebu?

A. Yes, sir; they were talking, but I did not hear it.

Q. How did he call you people in the townhall, before getting into the carromata to return to the quarters?

A. He ordered us to get into the carromata and he started toward the quarters, getting in afterward.

Q. When did you follow the defendant, the first time or the second time?

A. I have already stated that I went with him the second time.

FISCAL. Nothing more.

Cross-examination by the counsel for defense:

Q. What policeman came to the quarters with the lieutenant?

A. I do not know his name, but I do know his surname. I know he is Almonte.

Q. Do you know him?

A. I know his face. The policeman himself said that that was his name, because he was questioned by Montero.

Q. In what direction is the commanding officer's house from the quarters, east or west?

A. East.

Q. Did you see the carromata when it left the quarters?

A. When it left the quarters it went towards the Normal School, but it had to turn a corner.

Q. Then in order to go to the commanding officer's house, they started towards the west?

A. Yes, sir.

157 Q. At what hour did the defendant first arrive?

A. Past two.

Q. Can you not fix the hour better?

A. I can not state exactly the hour that he arrived at the quarters the first time, because I did not have a watch. It is only my estimate.

Q. When they arrived at the place where the corpse was, did all those in the carromata get out of it?

A. All of them had gotten out except the driver, Ruiz, who remained there.

Q. Going from the quarters to the place where the corpse was, did you three, who were on foot, walk just behind the carromata or at some distance?

A. On leaving the quarters, we all left at the same time, but those of us who were on foot were about two yards behind the carromata.

COURT. And just the same all the time on the road?

A. Yes, sir; because each time that the carromata went a little fast we started to run, or went faster also.

Q. When you people arrived at the place where the corpse was, were you about four yards from the same carromata?

A. Yes, sir; at the distance of four yards, until arriving at the place where the corpse was; but on arriving there we went nearer because the carromata had stopped.

Q. How long did you people take to go from the quarters to the place where the corpse was?

A. According to my estimate, half an hour, more or less.

Q. Is it the same distance from the quarters to the place where the corpse was as from this place to the townhall?

158 A. I can not state precisely whether those two distances are equal, but we took almost the same time. But perhaps I can say that from the place where the policeman died to the townhall is nearer.

Q. What person or persons put the corpse into the carromata?

A. Tecson, Gabato, Ruiz, and Montero.

Q. In what part of the street was the dead man when you saw him first?

A. Going in the direction of El Pardo, on the east or the left.

Q. At what distance from the paling fence on the left side?

A. Ten steps from the edge of the fence to the dead man.

Q. Do you mean to say ten steps from the fence on the left side of the street, going toward El Pardo?

A. Yes, sir; on the left side.

Q. How far was the fence from the right side of the street?

A. I can not state that distance exactly.

Q. Did you try to learn whether there was any person in the street while they were putting the corpse into the carromata?

A. I did not see anything besides the dead policeman.

Q. Did you look around any?

A. No, sir; I was only waiting for the orders of the lieutenant.

Q. Did you see him or any other man looking for anything near the corpse or in the street?

A. No, sir.

Q. Did the constabulary men who were on foot follow the carromata when it returned with the corpse?

A. We went behind the carromata; the lieutenant and Ruiz were with the corpse.

Q. Did you people go on the same streets where the carro-
159 mata went?

A. Yes, sir.

Q. How far were you from the carromata?

A. When the carromata started away with the corpse we were at the place where the dead man was picked up; and the carromata went ahead, and we remembered the street where the carromata passed, and we followed after it on foot.

Q. At what distance was the carromata when you people started with the corpse from the place where you were?

A. After the corpse was put into the carromata the lieutenant ordered us to go, and he went with Ruiz, and in the meanwhile we remained in the place where the corpse was, and afterward, remembering the street where the carromata passed, we followed behind it. I believe that the distance must have been near the church of San Nicolas.

Q. Did you people stay in the place where the corpse had been until the carromata reached San Nicolas Church?

A. We arrived at the same time as the carromata, and there must have been a distance of four yards between the carromata and us who were following behind, walking.

Q. Did the carromata in which the corpse of the policeman was pass through Calle Padilla to the church?

A. When the corpse had been loaded into the carromata it started from that place in this direction, and turned around a corner where there is a lane. In front of this lane is the house of the president, and in that direction is Novaliches street.

Q. Was the front of the carromata toward El Pardo when the corpse was put into it?

A. Yes, sir; it was toward El Pardo; and on reaching the lane it turned the corner and went on to the street of Nova-
160 liches and turned to the left.

Q. Is the first street there a street to the left?

A. Yes, sir.

Q. How long have you lived in Cebu?

A. A little less than six years.

Q. Do you live in that part of the city?

A. No; I live in the barrio of Pili.

Q. Do you know where the presidente lives?

A. Yes, sir; I know where Don Luciano Bacayo lives.

Q. What do you mean—that you people turned the corner where the presidente lives?

A. Yes, sir.

Q. How far is it from the corner of the house where the presidente lives to the place where the corpse was found?

A. I can not estimate the distance.

Q. On reaching Calle Novaliches, how far behind the carromata were the soldiers who were on foot?

A. About as far as from here to that chair. [About thirty-five feet, more or less.]

Q. How far from you people was the carromata when it arrived at the bridge?

A. We did not see the carromata then, because it was ahead and the night was dark and rainy.

Q. From the time you people left the place where the dead policeman was until Ruiz went out to meet you at Kipp's saloon, whom did you meet at the street?

A. From the time we left the place where the policeman was killed we did not meet anything except at the station of San Nicolas. Afterward we met Ruiz when we were near Kipp's bar.

Q. When you stopped at the San Nicolas station how far from the carromata were you?

161 FISCAL. I object to the question, because the witness has not stated that they stopped there.

COURT. Objection sustained.

Q. Did you stop at the San Nicolas police station?

A. No, sir; we only passed by there.

Q. Did you see any police there at that time?

A. Yes, sir; we saw some policemen and the president, and I know the president very well.

Q. Did you speak to any of them?

A. The president, as he recognized me, asked me where I came from, and I told him that we were coming from the place where we had picked up a corpse.

Q. Did you meet any other person beside him?

A. No, sir; only Ruiz.

Q. Were the soldiers who were on foot together all the time, or did they separate?

A. We were together, going one after the other.

Q. Was Gimnasi with you people?

A. No, sir; he was not there.

Q. At what hour did you people return to the constabulary quarters?

A. Past 4 o'clock.

Q. Was it before or after Gimnasi returned?

A. He was already there when we arrived.

Q. Now describe, if you can, the body of the dead man. In what position was the corpse when you people found it?

A. When we arrived at the place where the dead policeman was he was stretched upon the ground with his head toward the fence to the east, and his feet in the other direction. I can not give any more details of the position, because when Mr. Pendleton

162 ordered that the corpse be put into the carromata I was a little distance away, because I was holding the reins by the horse's head.

Q. When you spoke of the fence on the east you referred to the fence which is on the right-hand side, going towards El Pardo?

A. Yes, sir. With my left hand I was holding my gun and with my right hand the horse's bridle. Starting from Cebu that place is toward El Pardo, and on the left-hand side was where the corpse was.

Q. Do you know where Mr. Kempsky lives?

A. No, sir.

Q. Do you know where Nicolas Godinez is?

A. Yes, sir.

Q. Where was the corpse with regards to the house of Nicolas Godinez?

A. The place where the corpse was is nearer here, towards Cebu; and the place where the house is is farther towards El Pardo.

Q. On the left-hand side of the street, going towards El Pardo?

A. On the left-hand side.

Q. Was there a lantern near the place where the corpse was found?

A. I do not know whether there is a lantern there, because I did not see any light.

Q. Is the house of Nicolas Godinez a large house on the left at the corner, between two corners?

A. No, sir: it is not a large house; an ordinary sized house and is between the corners.

Q. Do you know who lives in that house?

A. No, sir.

Q. Is it a Spaniard, American, or a Filipino?

163 A. I did not observe, but I know that a woman lives downstairs in the shop, and when I went there the following day, in the morning, I saw that she was a Filipino; and I believe that it is she who lives downstairs in the house.

Q. Were you in front of the house of Nicolas Godinez when they put the corpse into the carromata?

A. In front of the place where they loaded the corpse into the carromata, there is nothing more than the house of Nicolas Godinez and another small house.

Q. Do you know where the new house is just being constructed beside that house?

A. Yes, sir: it is beside the house of Nicolas Godinez.

Q. And is that the house on the side toward El Pardo from Nicolas Godinez's house?

A. It is behind the house of Godinez. It is not on the side street, nor toward El Pardo, but it is toward the east.

Q. Which house was built before Nicolas Godinez's house?

FISCAL. I object to the question as improper cross-examination and because enough questions have been answered in regard to that point.

COURT. Objection is sustained.

COUNSEL FOR DEFENSE. Note exception.

That is all.

BONIFACIO ADARNA; 32 years of age; married; chief of the police, municipality of Cebu, being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. Where were you on November 30, 1905?

164 A. Three a. m. November 30th, I was at the townhall.

To what morning do you refer?

A. For example, to-day is the 30th and to-morrow the first; I refer to the morning of the first.

Q. Do you know the defendant?

A. I knew him, because before he was accused I went twice to his office in the way of duty.

Q. State whether or not the defendant went to you that morning and, in case he did so, relate what happened.

A. Yes, sir. At fifteen or twenty minutes to four, Mr. Pendleton came with the corpse of the policeman, Leoncio Onabia.

Q. Was that policeman, then dead, on guard that night or off duty that night ?

A. He was on duty.

Q. Relate the details of the delivery, by the defendant, to you.

A. At the hour I have just mentioned, twenty minutes to four, more or less, he came looking for the chief of the police. Then the guard informed me and I met him at the door. On meeting me he took my hand and at once I saw a dead policeman in the street. I said to him, "Where was he?" and he told me in San Nicolas and afterward, because I was suspicious, because he had news, I said, "Let us see, policemen," and he ordered the corpse to be taken out because he wanted to deliver it to me.

COUNSEL FOR DEFENSE. I move that the part referring to the fact that the witness had suspicions be stricken out, because it is an opinion of the witness.

COURT. Motion is overruled.

COUNSEL FOR DEFENSE. Note an exception.

165 (Witness continuing). After the corpse had been taken out of the carromata, he looked at me and I looked at him. Then he made a sign with a finger and whistled twice and, afterward, a constabulary man came from the carromata. The sign which he made was as if to command silence. After that he turned around toward the soldiers, and in a voice which I could not understand, because I could not hear anything, I understood that he made a signal to have the companions of the constabulary soldier come in force. I understood that that was a sign that forces should come, who must be companions of his. Then the soldiers who had come with him, went away alone, and at the end of two or three minutes, five constabulary men came, but the messenger did not again show up; he remained at the carromata. Afterward, after the force had arrived, one of the constabulary men, one of the five who came, I do not know whether it was Grava or which of those five it was, delivered to Mr. Pendleton the revolver of the dead policeman and, afterward, the lieutenant delivered it to me, saying, "Here is a revolver for you," and I said, "Yes, it must be the dead policeman's." Afterward he said, "Let us see if it is loaded or not," and I replied, "It must be loaded;" then he said, "Look to see how many balls it has." I said that it must be loaded with five balls, because it is our custom that, although the revolvers carry six cartridges, we always take out one; then he noted that there were five and said, "Look out, one ball is lacking." I said to him, "It is our custom not to have more than five balls in all the revolvers which we have on the street." After that he noted that I had the revolver out of the holster and in my pocket, and he said, "Why have you the revolver loaded?" I answered him, "This is nothing, nor does it mean anything. If you act like a gentle-

166 man, because I will not do anything to you, you may feel assured that I will not do anything to you." Then he said to me,

"I remained because I have more forces and if I wished I could tear down the townhall right now." I said to him, "All right; no, sir. Feel assured that I will not do anything to you." Before that he called in his soldiers by name and, even made them take off their hats. He was looking at them, and said to me, "Let it be witnessed that I have brought you the corpse;" and I said to him, "Yes, sir." After that he ordered all of the soldiers to get into the carromata and I can not state anything more.

FISCAL. That is all.

Cross-examination by counsel for defense:

Q. How long had the deceased been serving on the police force?

A. Two months; he had been policeman before, but had asked for a vacation and he went to his town, returning from there about two months before.

Q. When did you receive the first news of the occurrence?

A. At about three o'clock.

Q. What did they tell you? How did that news reach you?

A. A policeman named Nicolas Echavez awoke me in my house, saying, "Sir, there is a dead policeman."

Q. Where were you living?

A. On Legaspi street.

Q. In what part of the city?

A. Barrio of Pili.

Q. What street is that?

A. The street which goes directly toward the theater, and I live on the left-hand side.

167 Q. The first street north of this court?

A. I do not know.

Q. In what place was the deceased policeman on duty on the night in question?

A. In the suburb of San Nicolas, on the streets of Luis Florez and Torres Bugallon.

Q. On those streets between Tupas street and the beach?

A. Yes, sir; toward the beach.

Q. And from the bridge, Concordia, to the school?

A. What school?

Q. Public school of San Nicolas.

A. I can go to that district sometimes, because there is a guard in the quarters; that is to say, that the principal beat belongs to that person, aided by the guards in the quarters.

Q. Was the public market included or not in the district assigned to the deceased policeman?

A. Yes, sir.

Q. At what hour did he go on duty?

A. From twelve to six a. m.

Q. Is not the guard changed from twelve to four?

A. It is changed. It is from twelve to six; six hours.

Q. Is the street Tupas the same which was formerly called Novaliches?

A. Yes, sir.

Q. And how far from the street Padilla is the place where the policeman was killed?

A. As far as from the school on Tupas as the distance from here to the seminary.

Q. Have you gone to the place where the policeman was killed since the occurrence?

A. No, sir; because after the body was delivered, I went
168 to the quarters.

Q. I mean up to the present.

A. Yes; I passed by there several times.

Q. Do you know where the lantern is near the place where they say that the policeman was killed?

FISCAL. I object to the question, because the witness has not been in the place where the affair occurred.

COURT. The objection is sustained.

COUNSEL FOR DEFENSE. Note exception.

Q. Where is the revolver which the defendant delivered to you?

A. It is in San Nicolas, and the policeman who is now on duty has it.

Q. What kind of a revolver is it?

A. .45 Colt.

Q. Is it the kind which all the policemen carry?

A. Yes, sir; it is the arm which the Government has given us.

Q. When the lieutenant went to the townhall and was talking to you, was he armed?

A. No, sir; he did not have anything.

Q. Was there a man belonging to the police force that night named Almonte?

A. Yes, sir.

Q. What is his name and surname?

A. Ramon Almonte.

Q. Where was he the night when he was on duty from twelve to six?

A. On the streets Magallanes, Balintauac, Carmelo, and another, the street of the theater.

169 Q. Between what streets on the street of the theater?

A. Between Carmelo and Balintauac.

Q. On Magallanes street, to the east, there is an American bar belonging to Kipp?

A. Yes, sir.

Q. And on the west of that bar is the French restaurant?

A. Yes, sir; toward the church of the Recoletos.

Q. How far is it from that place to the constabulary quarters; the shortest distance?

A. I can not estimate it.

Q. Do you know where the house of the commanding officer of the constabulary is?

A. Yes, sir; it is in Parian.

Q. Can you give me an idea of the distance?

A. I estimate that it is about as far as from here to Parian; less than half a mile.

Q. A quarter of a mile?

A. I can not say whether it is a quarter of mile or not. I have said that it is the distance from here to Parian.

Q. In the information that you received of the occurrence, did you learn the names of the policemen who started to run on the night of the affair?

A. Yes, sir.

Q. What are their names?

A. Leon Dunan, Narciso Deabordo, and another who ran toward the church, named Eulalio Quimaco. The first two started to run toward El Pardo. I can not state exactly which of the two went towards El Pardo, but there were two who ran toward El Pardo and one who ran toward the church.

Q. Was it any one of those three persons who communicated to you in your house the news of the death of the policeman?

170 A. No, sir.

Q. Where was Leon Dunan stationed that night?

A. As I did not have the papers here I do not remember it; but the three policemen went to their corresponding beats. One of them was on the bridge, Concordia, another on the bridge of the revolution, and another in Calamba street.

Q. Can you exhibit your book where you have written down the beat of the policemen of that night?

A. Yes, sir; I have written it down on a paper and I showed it to Mr. Sleeper himself, when he went to see me.

Q. Can you bring that book this afternoon?

A. Yes, sir.

Q. How far is it from the place where the policeman was killed to the police station of San Nicolas?

A. As far as from here to that monument on the plaza.

Q. Is the police station on Tupas in front of the normal school?

A. Not exactly in front, but on the opposite side.

Q. And in the same block of houses which is in front of where the policeman was killed?

A. Yes, sir; in the same block.

Q. Is the police station in front of the first street, going toward the church; the first street to the right, or the last street on the left, coming from the place where the policeman was killed?

A. If you go towards the right you come afterwards to the street where the policeman was killed.

Q. Where the place Paho is; do you know?

A. Yes, sir.

Q. State what boundaries the street has.

A. Going down from the bridge there is a kind of a sewer

171 on the left of Carmelo street where there are two paho trees.

Q. How many blocks is there in that barrio; how large is it?

A. I cannot state.

Q. Two or three?

A. I cannot remember, because I have only passed by there.

Q. What kind of people live there, generally?

FISCAL. I object to this as being improper examination.

COUNSEL FOR DEFENSE. I am trying to show by means of this question that the defendant had a right to have armed people with him, in view of the kind of people who live in those places.

COURT. The question will be permitted. He may answer the question.

A. I have observed that that is the place where the prostitutes live.

Q. Now, then, from the American saloon to the place where the policeman was killed, are there thieves, or people dangerous to a man walking in the street at 3.00 a. m.?

A. Not on that street Padillo.

Q. Is it not true that various robberies have been committed in that place in June, this year?

FISCAL. I object to the question as immaterial and improper cross-examination.

COUNSEL FOR DEFENSE. I wish to prove by this witness that since May, 1905, the houses situated in the district where the policeman, Almonte, was stationed, and the place where the dead
172 policeman was stationed in the same direction have been the scenes of robberies and thefts, and, besides, I wish to prove by this witness that the defendant was going in the direction of Minglanilla, which is a town which has been invaded by bandits not more than six months ago.

COURT. The court sustains the objection of the fiscal on the ground, in the first place the proof is not relevant, and, on the other hand, that the accused was on the road to Minglanilla is a question for the defense to prove, and overrule the proof also, because the witness has no knowledge of the alleged fact.

COUNSEL FOR DEFENSE. Note an exception.

Q. How long afterward did those four policemen, the one who started to run toward El Pardo, the one who started to run toward this direction, and Almonte, give the notice of what had occurred?

A. I can not state the exact time when they notified me; it was the same morning.

Q. Was it before or after the lieutenant went to the town hall?

A. The news of their having run was received after the corpse was delivered to me.

Q. Did they give you the news voluntarily, or were they called by you?

A. They were called by me to the station. After the corpse was delivered to me they gathered together awaiting for me.

Q. How is it that those four were with the others in the quarters?

A. Because the presidente was there, and they were waiting
173 for me, and when I arrived was when they told me that those were the ones who had run.

Q. But you do not know how they reached the quarters?

A. I do not know anything about it; they only told me.

Q. What is the name of the policeman stationed in the place where the policeman was killed?

A. Narci-o Deabordo.

Q. Are all those policemen here?

A. Yes, sir.

Q. Where is Ramon Almonte; in the city?

A. He is here in the fiscal's office.

Q. Has he been here uninterruptedly since the day the affair occurred?

A. Yes, sir; and he is stationed within the city.

Q. Have the four policemen been on duty since then?

A. Yes, sir.

Q. Do you know whether any policeman found empty shells and delivered them to the court or any person?

FISCAL. I object to this as improper cross-examination.

COURT. Objection is overruled.

FISCAL. Note an exception.

A. Not to me.

JUDGE. Court is adjourned until 3.00 p. m.

SEVENTH SESSION.

The continuation of the hearing in the present cause was called at 3.00 p. m. January 2, 1906, there being present the persons
174 named at the beginning, and the following proofs were presented.

Cross-examination of Bonifacio Adarna continued:

Q. In what district was Leon Dunan assigned?

A. The bridge of the revolution, Padilla street, Juan Anibal and Luzon.

Q. From the bridge of the revolution to the east or to the west?

A. The district comprehends the places, both on the east and west.

Q. On which side of the river is the street Luzon?

A. Toward Norete.

Q. On the Cebu side or on the El Pardo side?

A. On this side.

Q. And on the other side of the river was where the policeman was killed?

A. Yes, sir.

Q. And are all the other streets which you have mentioned on the same side of the river as the street Luzon?

A. Luzon and Leon Anibal to the left, and Padilla toward El Pardo.

Q. Does Padilla street pertain to the district which goes toward the west from the river to El Pardo?

A. Padilla street is called Colon street, going from the bridge toward the east.

Q. You say that Narciso Deabordo was in the place where the policeman was killed; in the same district? What district did he have?

A. Calamba, Bonifacio Arana, and the Third of April.

Q. Where are those streets, on the east or west of the river?

175 A. On the west; Arana and Calamba toward Norete, and the Third of April to the east.

Q. On which side of the bridge are they: on the side toward El Pardo, or the side toward Cebu?

A. Toward the suburb of San Nicolas.

Q. Which was the street nearest the bridge which pertained to Narciso Deabordo?

A. The Third of April and Andres Bonifacio.

Q. On which side of the river is the street Third of April: is it on the west and along the bank of the same?

A. Yes, sir: to the west.

Q. Does the street, Andres Bonifacio, cross this other one [pointing to it]?

A. Yes, sir; it crosses the street Third of April, going to the bridge of the revolution.

Q. Was the street Andres Bonifacio in the district of Narciso Deabordo?

A. No, sir; it is the street Bonifacio Arana.

Q. Where does this street, Arana, cross the street Third of April?

A. It goes toward the bridge of the revolution, but it does not cross; but it touches the bridge and follows the river. The one which goes straight is the Third of April and Bonifacio Arana stays on the side of the river toward San Nicolas.

Q. Where do those streets cross; in what place, can you state exactly?

A. In the street Calamba; also the street Third of April crosses the street Calamba.

Q. And does the street Bonifacio Arana cross the street Calamba to the north or the south of the street Padilla?

A. The street Calamba crosses the street Padilla to the

176 south.

Q. After passing the bridge, the first street one comes to is the Third of April, is it not? The street Padilla is to the west of the bridge; now where is the street Bonifacio Arana?

A. Here [pointing].

Q. Then the streets Bonifacio, Arana, and Padilla are parallel?

A. Arana is north of Padilla and is parallel to it, including the Third of April.

Q. What district did Eulalio Quinzaton have?

A. Concordia, the bridge, Tupas, and P. Espeleta.

Q. Where is the street Tupas?

A. It is the one which goes toward the public school of San Nicolas.

Q. And is the street Lacandola the first street on the west of the Third of April?

A. I do not remember. It is a smaller street.

Q. Do you know whether there is a street which is on the east of the church?

A. I do not know; I can not state exactly where the street Lacandola is.

Q. Where is the street P. Espeleta?

A. The street which goes toward the church is P. Espeleta, and from the bridge Concordia it goes directly to the churchyard of the church of San Nicolas.

Q. And it goes from Lacandola to the Third of April?

A. I can not state exactly where the street Lacandola is. I imagine I know where it is, but I can not state exactly.

Q. Quiamko was in the street Lacandola that night?

177 A. I suspected that it pertained to him, but I can not state exactly if it is the same place, because there is a street which goes toward the San Nicolas cockpit, but I can not determine with certainty.

Q. Do you know where the street Panay is?

A. Yes, sir; on the other side of Padilla, but I can not state exactly.

COUNSEL FOR DEFENSE. Nothing more.

Redirect examination by the FISCAL:

Q. As chief of the police, what instructions have you given the police with regard to the attitude they should maintain when anything happens?

COUNSEL FOR DEFENSE. I object to the question as improper redirect examination and as immaterial.

COURT. Objection is overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. I always ordered them that when anything occurs that they must be present at the place and observe the place where it occurs, and, if necessary, that they collect to observe in what place the thing occurred.

Q. For example, when something occurs in District A, should those who are in District B collect in the first district in case something occurs there?

A. Yes, sir.

Q. The counsel for the defense has questioned you about the policemen whom you saw when you were at the station of San Nicolas; now, I want to ask you whom you saw immediately after the corpse was delivered to you.

A. Those whom I saw, because I saw the companions of the dead man, were Eulalio Quiamko, Leon Dunan, Narciso Deabordo;

178 I do not remember the other policeman, but they all belonged to San Nicolas.

Q. Was Ramon Almonte in San Nicolas when you saw the others?
A. No, sir.
That is all.

LUIS PADOLINA; 30 years of age; resident of San Nicolas; married; laborer; being first duly sworn, testified as follows:

COUNSEL FOR DEFENSE. I object to permitting this witness testify in the present cause, giving the same reasons which were stated in the case of the first witness.

The fiscal reproduces his arguments then made. The court overrules the objection, and the counsel for defense notes an exception.

Direct examination by the FISCAL:

Q. Where were you on November 30th?
A. In my house.
Q. Where are you living?
A. In San Nicolas; street of C. Padilla.
Q. Were you not in that same street the night of that day?
A. Yes, sir; I was in my house sleeping.
Q. Do you know what occurred that night on that street?
A. I was awakened by the shot.
Q. Where did you hear the shot?
A. When I heard the shot, I judged that it was probably fired near my house, and because of the noise in my street I arose and went to the window.
Q. Where did you go; to what window?
A. I opened the window a little; enough to see what was in the street, and I saw a policeman stretched on the ground.
179 I recognized he was a policeman by the helmet which he wore.
Q. What more did you see near the place where the policeman was?
A. I did not see anything more, except the policeman stretched in the street. Now, I am going to tell what I heard. I heard the following words, "Come on the guards," and afterwards, "Municipal."
Q. What more did you hear?
A. After having heard this last I heard the noise of those who got into a carromata or cart.
Q. What more?
A. Afterward, a short time afterward, I heard them talking Visaya.
COURT. Those same persons or others?
A. Other persons. And as I also went to the window to see who they were I saw they were policemen. There were three policemen who were talking.
Q. How long after those whom you first heard had come away did you hear those who spoke Visaya; that is to say, after you heard those who talked English and afterwards those who talked Visaya?
A. About eight or ten minutes.
Q. What more happened after you went to the window, when the three were talking Visaya?

A. One of those three policemen struck a match to see if his companion had died or not, and as it was not easy to see what had happened by means of the match, they asked for a light at a house near mine, in front of mine, and the policemen having gotten the
180 light, were walking around and around in the street, and a few moments afterwards I heard the noise of a carromata or cart coming to the place where the policeman had fallen dead, and on hearing that noise they started to run.

Q. Where did the light remain?

A. It was on the ground.

Q. Was it lighted or not?

A. A short time after that American had arrived the light was put out.

Q. When that American came, did he come in a carromata or quiles, because of the approach of which the policemen started to run?

A. As I observed, the American arrived in that carromata, and I observed that when he arrived there he got out of the carromata, because I heard that he was whistling there.

Q. Did you see that or hear it?

A. I heard it, because, as was seen, the American was whistling, and a few moments later, after so much whistling, another whistle answered, but at some distance.

Q. What more, after that? What more happened that you heard?

A. After the other whistle had answered, it went farther away. A short time afterward I heard a voice saying "Halt," and another answered, saying "Policeman." Afterward I observed that the American had come farther away, and as he did not meet anyone, not even the one who answered "Policeman," he returned to the place where the policeman lay dead, and then the corpse was picked up and put into the carromata.

Q. That is what you heard; now, I am asking you what you saw, and nothing more.

A. All that I saw was the policeman who died and the three policemen who were there talking and watching the corpse of
181 the dead man in the place where he had fallen.

Q. Immediately after that shot what did you see?

A. I only saw the policeman who fell dead and the shadow of the vehicle in which the American was.

Q. How long afterward did you see the other three policemen?

A. When the policeman fell deal I watched him for about a minute or less, because I again went to bed. Afterward when I saw the other three policemen who were talking—I believe that two or three minutes must have passed, because after having seen them I watched them for a long time, then again went to bed.

Q. I am not asking you about the length of time that you watched the policemen, but how much time elapsed from the moment that you saw the policeman stretched on the ground until you saw the other three policemen.

A. According to my estimate, four or five minutes must have passed.

Q. To what does the eight or ten minutes that you spoke of before refer?

A. From the time the American went away until the three policemen arrived.

Q. Before the corpse was picked up?

A. Yes, sir; before it was picked up.

FISCAL. Nothing more.

Cross-examination by counsel for defense:

Q. Did the policemen go there almost immediately after the American who fired the shot went away?

A. A short time afterward.

Q. Who lives at the house where the policemen got the light?

182 A. An American, with his querida [mistress] and her mother.

Q. Is that the house in front of the place where the dead policeman was?

A. Not exactly in front.

Q. But almost in front?

A. From the corner of the house to the place where the policeman fell dead I believe it was the distance of three yards.

Q. Is your house on the same side of the street as the house where they got the light, or on the opposite side?

A. On the opposite side. It lacks four yards of being absolutely in front of the house on the opposite side where they got the light.

Q. Is it four yards towards the bridge or towards El Pardo?

A. My house is towards the bridge.

Q. Is your house in front of the house now under construction?

A. Yes, sir.

Q. Is there a lantern near the house which is under construction now in front of your house?

A. Yes, sir.

Q. Was there a light in that lantern?

A. There was no light in it when I saw it.

Q. Did you see the policeman before he was killed?

A. No sir.

That is all.

JUDGE. Court is adjourned until 9.00 a. m. to-morrow.

EIGHTH SESSION.

183 The continuation of the hearing of the present cause was called at 9.00 a m., January 3, 1906, there being present the persons named in the beginning, and the following proofs were presented:

NARCISO DEABORDO, resident of Cebu, married, 26 years of age, municipal policeman, being first duly sworn, testified as follows:

(Counsel for defense objected to permitting this witness testify, basing his arguments on those set forth in the case of the first witness. The fiscal reproduces his arguments, stated at the same time. The court overrules the objection of the counsel for the defense, who notes an exception.)

Direct examination by the FISCAL:

Q. Since when have you been a policeman?

A. Two years.

Q. Were you a policeman last November?

A. Yes, sir.

Q. Where were you on duty November 30th, Thanksgiving Day?

A. Calamba street.

Q. State whether anything occurred or not in that district that night.

A. Yes, sir; something occurred.

Q. Relate it.

A. That night, or rather the early morning, about 2.30 I heard a shot which I believed to be in the neighborhood of the place Paho, and as I did not know exactly in what place that shot was fired, I was waiting to hear another and then I heard another shot,
184 and I noted that it was in the place near the hippodrome. Immediately after that I started to run towards the other policeman, who was stationed on the bridge Fajina.

Q. What is the present name of that bridge?

A. Bridge of the revolution. Afterward I asked the policeman who was stationed on that bridge where the shot came from.

COUNSEL FOR DEFENSE. I ask that the last part of this testimony be stricken out as being hearsay.

FISCAL. It is a policeman, who, in the fulfillment of his duty, has tried to investigate where the affair occurred.

COURT. The conversation of the witness with the other policeman is striken out.

Q. Why did you start to run toward the bridge Fajina?

COUNSEL FOR DEFENSE. I object to the question, because it is calling for the opinion of the witness.

COURT. He may answer.

COUNSEL FOR DEFENSE. Note an exception.

A. Because it is our duty to go to a place where anything occurs.

Q. Continue your statement.

A. After I had asked the policeman where that shot had been fired we came in this direction to find out where the shot came from. On arriving at the end of the bridge toward the hippodrome we saw a carromata, without lights, going toward San Nicolas. We stood there waiting for that carromata, and when it arrived I said to those in it that they should light the lamps, speaking to the driver, but I
185 do not know whether they heard what I said, because the carromata went on.

Q. In what tone of voice did you say that?

A. In Visaya; in an ordinary tone.

Q. What more?

A. Afterward, when we returned toward the place where we came from we met two policemen, one of whom asked who fired the shot and where it was.

Q. Who was that policeman who asked?

A. They were Quiamco and the deceased Leoncio Unabia.

Q. What more occurred?

A. I answered that it was an American who fired. Afterwards we continued walking behind the carromata, looking to see where it would stop. After arriving near the street Calamba, near the corner of that street where the deceased Leoncio Unabia was stationed, he told us that the carromata had stopped. They had stopped and we went there to see what happened; and on arriving in the place where the carromata was standing the deceased stood on the right-hand side of the carromata going in the direction of El Pardo. Leon Dunan followed behind him. I went on the left-hand side, going in the same direction and behind me was Quiamko. The deceased continued walking, and as I was able to talk to the driver I told him he should light the lamps.

Q. While this was happening, where were you people?

A. On the east side of the carromata.

Q. In front or behind?

A. Near the step on the left-hand side.

Q. State the distance that you were from the carromata.

A. A short distance ahead—three feet.

Q. Were you behind the carromata the distance you have stated?

186 A. At the side of the carromata; not behind.

Q. What more?

A. Afterwards, Onabia was asked his name. They said, "What is your name; who are you?" and Onabia answered that he was a municipal policeman. Afterward, he again asked who Onabia was, and the driver asked the same question, as he said, by the order of the lieutenant, and he again asked "Who are you; what is your name?" At once the deceased answered that he was a municipal policeman. Afterward a noise sounded inside the carromata and a voice inside said, "God dam' policeman." Afterwards Onabia went away from the place where he was talking and where he was questioned, and went toward the rear of the carromata as though to escape, and, afterward, without anyone expecting it, a gunshot sounded. After that shot we saw that it was an American by the gold braid on the shoulder straps; by reason of the light produced by the flame from the gun we saw that he was an American, and that he wore gold braid and at once we saw the policeman fall.

Q. Immediately before the shot sounded, where was the policeman, Onabia?

A. I do not know, because I did not see him, because the night was dark.

Q. I am not asking you about his face, but his form. Where was he going?

A. Coming from the carromata, on behind the carromata, toward the side toward the east.

Q. Toward where did you start to run?

A. Toward El Pardo.

Q. How many remained?

A. Two.

Q. You were one; who was the other?

187 A. Quianco was the other who started to run towards Cebu. He returned to where he came from.

Q. Where did you go to?

A. Toward the street Calamba; toward the corner where there is a chapel is where Leon passed.

Q. You are speaking of Leon; I am talking about you; where did you and your companion go?

A. We went toward El Pardo; Quianco came behind me.

Q. Where did you go to; what place did you leave?

A. Toward the street Panay toward El Pardo and on arriving at that street we turned to the right where the presidente, Bacayo, formerly lived; a house with a tile roof. Afterward we took another turn toward our quarters and there gave the news to Cebu.

Q. Did you see Leon there or not?

A. Yes, sir; he was already there.

Q. What more happened after notifying Cebu?

A. We notified Cebu by saying that our companion had been shot by an American.

Q. What more?

A. When we reached the quarters the corporal of the guard said that we should go and notify Cebu immediately, and we did so. A short time afterward, after having notified by telephone, they answered us that we should examine the corpse and the place where it was and we four went to examine it—Quianco, Villarta, Donan, and I. Upon arriving at the place where the policeman was, we saw that he was stretched on the ground face down. We asked for a light in the house of Godinez, and with that light we lighted up the body. After having held the light there a little while we were looking for the revolver of the deceased and were quite a while

188 finding it. The first thing we found was the club which was near the fence at the edge of the side of the street. After having looked for the revolver of the deceased one of our companions found it under the dead man's body, said revolver being spotted with blood. One of our companions said to me that we should not touch it, nor take the revolver, because he believed that the corpse should be picked up officially. Our companion had scarcely finished saying "we should not pick up the revolver" when we heard the noise of a carromata, and we saw that it was at the corner of the street Calamba and that it did not have a light. And we heard a voice saying, "Corporal of the guard." I do not know what that means,

because I do not understand. On hearing this word we started to run toward El Pardo, and on reaching the corner of the street Panay we stopped. Afterward, when the carromata arrived at the place where the policeman had been killed a whistle sounded, indicating some occurrence, and the presidente came to the place where we were standing, as he had heard the noise of the whistle and said that we should answer that whistle. After we had answered that whistle a voice was heard in the place where the carromata was standing, which came from the place where the corpse had fallen, saying "Halt." To that voice we answered "Police," and afterward we heard a voice which said "Come in, policemen," and comprehending that there were many people in the place where that voice had been heard—many more people than there were of us—the presidente ordered that we should go toward the street Panay, indicating to us that we should go to the place where the old house is on that same street. We turned to the left around the corner near his house,
189 going toward the quarters, but when we arrived there scarcely five minutes had elapsed when the carromata came on the run, without a light, and the constabulary men came behind it. One of the constabulary men came on foot, Grava, whom we asked where he came from, and he told us he came from picking up the corpse; that is all I know, because I can not state anything about the rest.

Cross-examination by counsel for defense:

Q. How far from the bridge of the revolution is the place Paho?

A. As far as from here to the place where the three is which is behind the monument on this plaza.

Q. Do you know whether the distance from the bridge to the hippodrome is the same as from the hippodrome to Paho?

A. It is less distance from the hippodrome to Paho.

Q. Is the hippodrome as near the bridge of the revolution as is the place where the policeman was killed?

A. The place where the policeman was killed is farther from the bridge than the bridge is from the hippodrome.

Q. In what part of Calamba street were you when you heard the first shot?

A. At the corner.

Q. At the corner of Calamba and Padilla?

A. Yes, sir; at that corner.

Q. There are two streets between Calamba and the bridge of the revolution, are there not?

A. There are two cross streets.

Q. How far is the police station to which you have referred from Calamba, state?

A. As far as from here to the Cotta.

Q. And is the police station the first building to the
190 west of the corner of Calamba and Tupas.

A. No, sir; because on arriving at the quarters it is necessary to turn another corner to the right, coming from Calamba street.

Q. Is not Calamba street the one which ends at the middle of the church?

A. Calamba street runs toward the north, coming from the market of San Nicolas.

Q. But does that street pass beside the lands of the church?

A. Yes, sir; beside the courtyard of the church.

Q. Going to the west from the corner of Calamba street toward the church, is not the quarters the first house that you come to?

A. Yes, sir; toward the right. But from the corner of Calamba street to the quarters is as far as from here to the Magellan monument.

Q. You have often been in the district of Calamba street, as it is your district, haven't you?

A. Many times.

Q. Do you know the place where the policeman fell?

A. Yes, sir; I know where it is.

Q. Examine Exhibit B, which is a photograph of the place where the affair occurred, and state whether it is indeed the photograph of that place.

FISCAL. I object to the question, because the photograph has not been admitted as proof before the court.

COURT. Objection overruled.

FISCAL. Note an exception.

A. I do not know.

191 Q. Examine Exhibit A and state whether it is the place where the policeman was killed?

A. I do not know what this is, or where it is.

Q. How many strips of braid did you see on the defendant; one or two?

A. I only saw one, because his side was toward me.

Q. Which side?

A. The left side.

Q. Do you know where Felicia Velasco lives?

FISCAL. I object to the question as immaterial and because it is not known what part that woman can have in this cause.

COURT. He may answer for the present.

A. No, sir; I do not know where she lives.

Q. Is there any house in front of the house of Nicolas Godinez, but on the other side of the street, and a little to the west?

A. Yes, sir; there is a bake shop.

Q. Were you and your companions in that house that night?

A. No, sir; we were not in that house.

Q. Did you see any light in that house or any person moving in it?

A. No, sir; I did not see any.

Q. Is the house mentioned before, which you say was formerly occupied by the presidente, on the same street where the block of houses and the police station is?

A. Yes, sir; on the same street.

Q. How far from the police station?

A. As far as from here to the other side of the Magellan monument.

192 Q. Is the house on the west side of Panay street?

A. It is Tupas street on the east side.

Q. In what direction; to the west of Panay street?

A. Coming from Panay street, going toward that house, the house is on the right-hand side to the east, going toward the beach. On the east side is the street of Panay.

Q. Then the old residence of the presidente is on Tupas street between the quarters and Panay street?

A. It is on Tupas street near the street of Panay, on the right-hand side.

Q. Were you and your companions armed that night?

A. Yes, sir; we all carried Colt revolvers.

Q. What caliber?

A. 45.

Q. When you saw that the policeman had fallen, why did you not arrest the man who had shot him?

A. We were afraid because he was an officer.

Q. Did you see a constabulary man who started to run away from the carromata when you people started to run?

A. I did not see him.

Q. How did you know that the revolver was underneath the corpse?

A. Because we held a light near there.

Q. Did you pick up the corpse?

A. We only moved him a little and it could be seen that the revolver was underneath, near the side.

Q. Did you pick up the club?

A. No, sir.

Q. How far from the body did you find the club?

A. As far as from here to one of the legs of that table [about three meters].

193 Q. And near the fence on the left-hand side of the street, going toward El Pardo?

A. Yes, sir.

Q. Was the revolver unsheathed or not?

A. It was outside the holster.

Redirect examination by the FISCAL:

Q. What do you mean to say outside of the holster?

A. The *the* revolver was outside the holster and almost touching the abdomen of the corpse.

Q. Near the abdomen?

A. At his side, and the revolver was not in the holster.

Q. Was it outside the holster, but near it?

A. When I saw it, it was outside the holster.

Q. When you ran toward El Pardo was there any person behind you or not?

COUNSEL FOR DEFENSE. I object to the question as improper cross-examination.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. I did not see anyone, because the night was very dark.

Q. But did you hear anyone running?

A. I did not hear anything, because of being afraid.

MAURICIO NOLASCO; 24 years of age; resident of San Nicolas; baker; being first duly sworn, testified as follows:

(Counsel for defense makes the same objections to permitting this witness to testify as were made in the case of the first witness and the fiscal reproduces the same arguments stated by him in
194 that case. Court overrules the motion and the counsel for defense notes his exception.)

Direct examination by the FISCAL:

Q. How long have you lived in San Nicolas?

A. I was born in San Nicolas.

Q. On what street of San Nicolas do you live?

A. On the street El Pardo.

Q. On the night of November 30th, or the early morning of December 1st, where were you?

A. I was at home.

Q. What were you doing that morning after midnight?

A. I was making "poto-mayo."

Q. What occurred that morning near your house?

A. I heard a gunshot.

Q. What more?

A. After the shot I heard a noise.

Q. What kind of a noise?

A. The sound of a voice, saying "Come on the guards," and also a voice saying "Look for a light." He sent the driver to my house.

Q. Who sent him?

A. The American told the driver to bring a light from my house.

Q. And where were you?

A. I was hiding inside my room.

Q. Where were you making the "poto-mayo?"

A. Downstairs in my house.

Q. Where did you have your light?

A. Downstairs, at the foot of the stairway.

Q. And how long did that noise continue just after the shot?
195 A. About three or four minutes.

Q. What did you do after that?

A. I do not know anything more, because after that I went to bed again and I did not learn anything more.

FISCAL. That is all.

Cross-examination by counsel for defense:

Q. Were you in your house when the policeman went to it after the American went away?

A. No; I do not know whether they came or not, because I was hiding.

Q. Did you see the four policemen in that place?

A. I did not observe, because in the first place I was upstairs in my house and because, besides, I was hiding.

That is all.

196 RAMON ALMONTE, resident of Cogon, Cebu; twenty-two years of age; a policeman, being duly sworn, testified as follows:

(Objection was made on the part of the defense for the same reasons stated in the case of the first witness for the prosecution.

The fiscal asked that the motion be denied for the reasons then expressed.

The court denied the motion and the defendant excepted.)

Direct examination:

Q. Were you a policeman in the month of November last?

A. Yes, sir.

Q. Where were you stationed on the night of November 30 and December 1st?

A. Calle de Colon, Carmelo, and Balintauac.

Q. What happened that night in your district?

A. That night when the American passed through the streets of my district he came to the restaurant of Kip.

Q. What American is that?

A. That one [pointing to the accused].

Q. What else happened?

A. I thought a carromata was coming, and when I saw it I thought there was no one in it, because it had no light. Then I approached, and when he saw that I was a policeman he said to me, "Oi, come on police aqui [here]." When I got close to him and was near I saw that he was a lieutenant, and what I did was to pay him the proper respect and say "Good evening." He answered "Good evening." Then I said, "Where is your cochero?" and he replied, "I have no cochero." Afterwards I asked him, "Señor, why have you no light?" and he replied, "I have no candles." Then he said, "Policeman, please come with me to the quarters of the constabulary." As
197 it is the duty of every policeman to furnish aid to anyone who asks it, I accompanied him and conducted him to the quarters.

Q. What quarters are those?

A. The quarters which are near the Normal on the same sidewalk.

Q. What happened then?

A. After arriving there I went to the post to which I was assigned.

Q. When you were going back did the lieutenant as well as the soldiers in the quarters see you?

A. Yes, sir; they saw me.

PROSECUTING ATTORNEY. That is all.

ATTORNEY FOR DEFENSE. Nothing.

Q. (By the COURT.) You say that the accused asked your assistance. What assistance did the accused need to go to the quarters?

A. He asked me to conduct him to the quarters.

Q. (By the COURT.) But why did he need assistance to go to the quarters?

A. Because he said he did not know how to go.

Q. (By the COURT.) Why could he not, why did he not know how? Was there anything the matter with him that night?

A. He was drunk.

The COURT. That is all. Call the next witness.

198 EULALIO QUIAMKO, 21 years of age, single, municipal policeman of Cebu, being duly sworn, testified as follows:

(Counsel for defense objects to the presentation of this witness for the same reasons stated with respect to the first witness for the prosecution. The fiscal opposes the motion for the same reasons before stated. The court overrules the motion and the counsel for defense excepts to the ruling.)

Direct examination by the FISCAL:

Q. Were you a policeman in November and December, last year?

A. Yes, sir.

Q. On the night of November 30th, where were you stationed?

A. On the street Tupas.

199 Q. Did anything occur in your district, or near your district?

A. Yes, sir; something occurred.

Q. Relate what occurred.

A. What occurred was as follows: First I heard a shot, and, in view of the fact that I did not note in what place the shot was fired, I did nothing, because I did not know the exact spot where it had come from. On hearing the second shot, I noted that it was near the bridge of Fajina and, therefore, I hastened to that place, Leoncio Onabio coming with me.

Q. Where did you come from with your companion?

A. We were coming from the barrio of Pasig.

Q. What did you say to Onabia?

A. He asked me where that shot had been fired.

Q. Relate what occurred afterward.

A. When I reached the bridge of Fajina with Onabia, two policemen were already there and a short time afterward a carromata came toward the place where we were. One of our companions said that they should light the lamp on the carromata, but they went on without taking any notice of what our companion said. Afterward, the deceased man said "Let us go to find out where the carromata stops." We went, not running, but at an ordinary gait, and when we saw the carromata at a certain distance—as far as from here to that tree which is near the monument—the carromata stopped. After it had stopped, the deceased man said "The carromata has stopped, let us go there," and when we went to the place where it was we went two

by two, and on arriving at a certain distance from the carromata, about as far as from here to that table [about three meters],
200 the deceased approached the carromata. He went up to the carromata on the side where the driver was, saying to him, "Light your lamp." The driver did not say anything, but from inside the carromata some one said, "Who is it," and our companion answered, "Municipal policemen." Afterward he again asked, "Who are you," and asked again. The policeman did not say anything and the driver said, "As he says, who are you?" The policeman answered them, "Leoncio Onabia." Afterward there was a noise in the carromata and a voice said, "God damn policemen." At that moment the policeman came toward the rear of the carromata, and on arriving in front and a little to the other side of the carromata, a shot sounded. After the shot was fired we fixed our eyes on the man who fired.

Q. What did you see?

A. An officer.

Q. Who—an American, Filipino, or who?

A. An American.

Q. How was he dressed?

A. In khaki.

Q. To what organization did he belong—civil or what?

A. Constabulary.

Q. Just before the shot, where was Leoncio Anabia going?

A. Towards Cebu.

Q. What happened to the policeman then?

A. When the shot was fired he fell, and as we were all afraid on seeing that it was an officer, we all started to run.

Q. Where did you go.

A. Toward El Pardo; to the corner of the street Panay.

Q. Where did you go afterward?

A. At the corner of the street Panay, I turned and went
201 toward the place where Presidente Bacayo formerly lived, and on reaching the other corner I turned again toward our quarters, and when I reached the station I told the corporal of the guard about the death of our companion. Then the corporal ordered us to return to the place to investigate, and when we reached the place of the affair we went to borrow a light which was downstairs in a house, and with that light we found the body of the dead man, and we saw that his revolver was at his side. A moment afterward the carromata was coming again, and as we saw that it was the carromata we started to run. A whistle was heard in the carromata, and afterward a voice saying "Corporal of the guard, come on the guards." We started to run toward the street Panay. At the corner that street we met the presidente. Afterward they shouted "Halt." One of our companions said, "Policeman is good." The presidente took us to a street toward his former house, and on arriving there we turned another corner toward our quarters, and on

arriving at the station we sat down and were talking, as did the presidente also, and that is all.

FISCAL. That is all.

Cross-examination by counsel for defense.

Q. Examine Exhibit A and state whether this is the same carromata which you saw on the night in question?

A. The shape is the same, but I do not know whether it is the same carromata, because the night was dark.

Q. Where was the policeman standing when he was saying that he was a municipal policeman?

A. On the right-hand side.

Q. Near the shafts or near the body of the carromata?

202 A. Yes, sir; near the driver; the driver's seat.

Q. Close to the carromata?

A. Yes, sir; very near.

Q. Who was behind the deceased and on the same side of the carromata?

A. Leon Dunan.

Q. How far was he from the policeman who was talking?

A. As far from here to the table. [A little more than a meter.]

Q. Then he must have been very near the rear of the carromata?

A. Yes, sir; but a little farther this way.

Q. About three steps?

A. I do not know whether it was three steps or not.

Q. Where were the other policemen while that one was talking?

A. On the left side.

Q. And were you near the driver's seat?

A. No, sir.

Q. Where were you?

A. I could just barely see the driver.

Q. Do you mean to say that you were at the horse's head, or behind the carromata or by the wheels?

A. Behind the carromata.

Q. Behind the wheels?

A. No, sir; in front of them.

Q. Behind or in front of the tire?

A. At the rear of the tire.

Q. Where was the companion who was on the same side?

A. In front of me.

Q. At what distance?

A. In front of the driver's seat.

203 Q. Was he near the driver?

A. No, but a little in front of the wheel.

Q. As near the step as the policeman who was killed?

A. Not exactly, sir.

Q. But how much more?

A. About a meter.

Q. How far was the carromata from the right-hand side of the street, going toward El Pardo?

A. As far as from here to that American officer. [About five meters.]

Q. How far from the left-hand side?

A. As far as from this table to that other one. [About three meters.]

Q. When you heard the shot, you ran towards the street Panay?

A. Yes, sir.

Q. Did you see a constabulary man who was running at the same time?

A. No, sir; I did not see him.

Q. Did you turn the corner of the street Panay to go to the street of Tupas?

A. Yes, sir.

Q. When you reached Tupas, did you go to the left to go to the quarters?

A. Yes, sir.

Q. And you met the presidente at the corner of Panay and Padilla streets?

A. Yes, sir.

COUNSEL FOR DEFENSE. That is all.

Redirect examination by the FISCAL:

Q. You said that you did not see any constabulary man run-
204 ning. Are you certain that there was no constabulary man, or didn't you see him?

A. I did not observe whether a constabulary man was running or not.

FISCAL. That is all.

JUDGE. Session adjourned until 3.00 p. m.

NINTH SESSION.

The continuation of the hearing in the above-entitled cause was called at 3.00 p. m., January 3, 1906, there being the persons named in the beginning present, and the following proofs were presented.

ENRIQUE SENECA: city physician of Cebu: 50 years of age; widower; being duly sworn, testified as follows:

(Counsel for defense makes the same objection to the presentation of this witness as he made with respect to the first witness for the same motives there expressed. Court overrules the objection, and the counsel for the defence excepts to said ruling.)

Direct examination by the FISCAL:

Q. Were you city physician December 1, 1905?

A. Yes, sir.

Q. Do you remember whether you examined the body of any policeman about that date?

A. Yes, sir.

Q. Was the policeman to whom you refer Leoncio Onabia?

A. They told me that he was so called.

Q. Did you examine the corpse of any other policeman
205 during the month of November?

A. No, sir.

Q. The policeman to whom I first referred was wounded by a bullet?

A. The policeman whom I examined had two wounds which I could not examine without an autopsy.

Q. State the results of your autopsy.

A. It must have been about five or six a. m. of the first when, by order of the municipal presidente, I examined the corpse of that policeman, Leoncia Onabia. He had two wounds. The first was situated in the right costal region, in the right ribs toward the back, or better said, in the costal-raquidian region of the right side, circular in form, about ten millimeters in diameter, with perfectly smooth edges. The second wound was in the left hipogastric region, slightly oval in form, about twelve millimeters in size. The abdomen having been opened to see the interior condition of those two wounds, the first showed coagulated blood from the right to left; toward the left side there was a little excrement outside the large intestine of the descending colon. The first would was exactly in line with the tenth rib of the right side, but without having penetrated the bone. The hole went down to the eleventh rib, the lower edge of which was broken, from which I infer that the person was killed by a shot from a gun, the projectile from which penetrated the abdomen from right to left and caused the death.

COURT. Please indicate on your body the place where the ball entered.

A. Here [the witness points to the tenth rib, between the costal region and the rachis, and the orifice of exit, near the eleventh rib].

206 FISCAL. That is all.

Cross-examination by the counsel for defense:

Q. How did you make the autopsy? With the nude corpse?

A. Yes, sir; but not entirely so, part of the abdomen was opened because I did not find any other wounds, except the one on the abdomen and I had to look for scientific data there in order to be able to make the autopsy; but the body was clothed. I did not see any other wound besides that.

Q. What do you infer from the fact that the wound was clean-cut?

A. From that and from the orifice of entrance, I deduced that the shot was not distant.

Q. Do you also deduce from that fact that the ball broke the skin at a right angle?

A. No, sir; it was not so, and I can prove it clearly to the court. As the surface where the ball struck is convex, as is the rib, the ball turned aside so that the shot must have been a little higher up than

the place where the ball penetrated, because the deviation was downward. I mean to say by that, that if the ball had struck the body at a flat place, such as a table for instance, the ball might rebound if it struck perpendicularly and the body were flat, but as it was convex, then according to whether the ball struck upward or downward would be the direction taken by it, because of the force of the shot, as is stated by writers.

Q. Did the bullet go straight in, penetrating the bone, or a little below the bone?

A. If the shot had been straight, it is possible that it would have broken the bone; because of the force of the powder, on the re-
207 bound it could not help but do so; but as the shot struck obliquely and not exactly in the center of the bone, on touching any place other than the center, as the surface is convex, the ball deviates and would go to one side or the other, according to its direction. If it had been upward, it would have deviated upward.

Q. This is the shape of a rib? [Showing witness a piece of wood shaped like a rib.]

A. More convex, but more or less the same.

Q. You have stated that if the ball touches the center of the rib, it would necessarily penetrate the bone?

A. If it touches the center it must break and it would either penetrate or break it.

Q. Now where did it touch, below the center or above the center?

A. It is possible that it was a little below the center.

Q. But very near the center?

A. Near the center; yes, sir. And as the surface is not flat but slightly convex, the ball, in order to deviate downward, has to touch a little below the center.

Q. Now, then, if the skin had not been cut by the ball at a right angle, the hole would not have been so round, but would have been somewhat oval?

A. With regards to wounds made by firearms, science has not yet discovered the reason and such strange phenomena occur that it has not yet been possible to prove why they do occur, speaking of projection in hard bodies. By hard bodies I also mean to speak of man, and of all which may be called a projection against a body. I wish to explain further. There are some authorities who admit that the orifice or entrance is as perfectly circular as the ball, but the au-
thorities also have admitted that it is only approximately so,
208 but not absolutely so.

Q. *Do* what authors do you refer?

A. The authors who admit that the orifice of entrance is smooth and smaller than the projectile are Sabatier, Richter, Richerand, Boyer, Enon, and Doctor Eguin, who has made the closest study of firearms.

Q. Have you any references to the pages of those books?

A. I can show them when required and also can read those same opinions from the authors with regard to this point. To be exactly

certain, it is impossible to be certain about shots in human bodies, because it all depends on external circumstances; it is chemistry which furnishes gunpowder, and each day now compositions of gunpowder are invented, as are also alloys of metals for construction of arms, and that influences the effects of the shot.

Q. Was the tenth rib broken?

A. No, sir.

Q. Was it not fractured in any manner?

A. No, sir; it was not fractured in any way. But what was done, was that it deviated and broke the other.

Q. But the shot did not leave any sign?

A. It did not make any mark on the bone; it is quite smooth, and what it did was to break the edge of the other rib, from which it is seen that a piece is lacking, but on the tenth rib absolutely nothing.

Q. Then, what you mean to say is that the ball entered near the center of the right of the tenth rib and passed by the eleventh rib on the same side?

A. Passed at the lower part of the edge of the eleventh rib.

Q. Passed inward or outward from the edge of the eleventh rib.

209 A. Outward from the rib, under the skin, following a path under the skin.

Q. I have understood you to say that the ball in passing broke a piece of the lower edge of the eleventh rib?

A. Yes, sir; a small portion of the edge has been broken.

Q. In what direction did the ball go from the edge of the eleventh rib?

A. It followed the left part, because I did not find any break in the small intestines, and it passed under the skin of the abdomen, continuing straight toward the left side, where it came out. It only touched the large intestine; the descending colon.

Q. Was the descending colon the only organ that was intersected?

A. That is all that I found by the hemorrhage which there was from the coagulations of blood.

Q. Now, then, was that part of the ball smooth or not?

A. I can not state because I did not find any interior wound. From what is seen it must have passed between the intestines through the covering of the abdomen, because I did not find any wound and I can not state whether the part was smooth, because it was impossible to find the path which the ball followed. I can only state that it was from the right to the left; the ball coming out at the left side. With respect to the interior injuries, I did not find any except the one which I have mentioned in the descending colon, so that I can not state anything with regard to those which might have been inside.

Q. With respect to the eleventh rib, at what height was the wound?

A. The entrance was at the tenth rib, or rather at the carti-

210 lage of the tenth rib at the level of the same and without injury to it.

Q. Where did the hemorr'age come from? What intercepted parts gave rise to the hemorr'age?

A. It intersected the arteries in the part of the abdomen above the intestines. The omentum was also wounded and the arteries of the same and the mesenteric arteries.

COURT. Were those arteries intersected?

A. Yes, sir; from the direction shown by the coagulations, and besides the arteries the muscular planes of the rib were intersected.

Q. Were the arteries intersected on both sides, or only on one side?

A. Not on the left side.

Q. I have understood that the diameter of the wound was from ten to eleven millimeters?

A. Yes, sir.

Q. Do you know what caliber of ball is indicated by that diameter?

A. No, sir; I can not deduce the caliber of the ball precisely, because of the strange phenomena which are presented by bullet wounds. A doctor can not state the caliber of the ball exactly.

Q. What was the immediate cause of the death of the policeman?

A. In the first place the immediate cause of his death was the shot, but all shots produce commotion and stuper which are two nervous phenomena which are always present in bullet wounds, and there are persons who, on being shot, have such convulsions produced in them that they die instantly.

Q. Do these convulsions ordinarily produce the death of persons wounded by bullets?

211 A. According to the degree and according to the individuals. This depends on the individual susceptibility. Convulsion has its degrees from instantaneous paralysis to coma and death, and there are other persons in whom these phenomena are not produced but only a greater or lesser loss of sensibility, and they may recover. In others, the loss of sensibility is total. There is a complete paralysis of all the movements which can not be understood except because of their degree of susceptibility.

Q. In your judgment, how much time would be needed for the death of a person with wounds like those now in question?

A. I can not state exactly, because they are nervous phenomena which show individual symptoms.

Q. Have you seen any cases during your experience where a man has died because of wounds of this nature?

A. I have had one case, but it was a wound in the head, with convulsions, and the person lived seven hours; and other cases which I could mention.

Q. But have you observed the case of a wound in the same part of the body?

A. No, sir; I have had no experience with such a wound.

Q. What was the condition of the corpse when you made the autopsy; was it already rigid?

A. Yes, sir; not entirely rigid, not in its entire extension, but the corpse showed symptoms of rigidness.

Q. How long after death does rigidness usually commence?

A. It is not always the same; ordinarily some hours past.

Q. Is there no general rule?

A. No, sir; for the simple reason that in medicine there is nothing absolutely exact; all is dependent upon circumstances.

Q. Were there any signs of powder on the clothes or skin
212 of the deceased?

A. No, sir; none.

Q. Can you state, in accordance with your experience, whether the orifice of entrance was made by a cylindrical projectile or a conical one?

A. It can not be stated exactly, because, as the orifice left in the skin is circular and the orifice is the same diameter as the ball, it would be the same for either.

Q. Is it not true that when a ball, spherical in form, enters a body at a right angle the entrance to the wound is round in form and that, on the other hand, when a conical ball enters, the orifice resulting is irregular in form?

A. There is no rule. That might be if the barrel of the gun were rifled; then, naturally, the ball has a whirling movement and must come out differently than a conical ball. But it must be remembered that the distance and the kind of powder used and the length of the weapon all influence the form of the orifice.

Q. Now, then, a cylindrical conical ball from a rifled barrel, as a general rule, will have an entrance orifice somewhat irregular in shape and not round and smooth?

A. According to the distance, because the authorities do not say anything about that. They only say that the closer the shot is fired the smaller will be the entrance orifice. But they do not say anything which can be taken absolutely.

Q. You made a careful examination of the corpse to see whether there were any other wounds; could you see whether there was any other wounds or contortions?

A. No, sir; I did not see more than that wound, although I examined the corpse.

213 Q. And did you find other wounds?

A. I did not find any other wounds.

Q. How tall was the deceased?

A. He was of ordinary height. We call a man who is somewhat taller than I a man of ordinary height, because I am somewhat short.

Q. Where were the clothes of the deceased put?

A. They were buried with him.

Q. Can you deduce from the wound anything as to the velocity of the ball, and whether it was fired at a distance or not?

A. No, sir; we can not state exactly, because it is necessary to know the force of the powder.

Q. Supposing that the shot had been fired at three paces from the man, can you state anything about the velocity of the ball as it leaves the barrel of the gun?

A. I can not state exactly, because I do not know the kind of arm, and it is not in the province of the physician to state the velocity. The old arms gave a velocity of 400 to 500 meters a second. In modern arms I can not state exactly without knowing the condition of the gunpowder.

Q. Can you state the difference which might exist in wounds caused by a bullet with a velocity greater than 300 meters a second?

A. I can not state it exactly.

Q. And of those which have a velocity of less than 200 meters?

A. I can not state that either.

Q. Did you measure the length of these wounds?

A. Yes, sir; I measured them.

Q. How did you measure them?

A. With a millimeter rule.

214 ERNEST NICHOLS; 24 years of age; resident of Cebu; native of England; single; merchant; being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. Since when have you been in Cebu?

A. Since March last year.

Q. Were you with the accused November 30th, last year?

A. Yes, sir.

Q. State whether the accused was drinking on that night?

A. Yes, sir; he was drinking.

Q. Quite a good deal; more than ordinary?

A. Yes, sir.

Q. About 2.00 a. m. was your carromata used by the defendant?

A. I cannot state whether it was used by the defendant, but someone, some other person did use it.

Q. Did you see that carromata on the following day?

A. No, sir; not on the following day.

Q. When?

A. The following Saturday.

Q. What was there in the curtain of the carromata?

A. Holes.

Q. How many?

A. I believe there were four or five.

Q. Who delivered that carromata to you on Saturday?

A. Major Nevill.

Q. Of the constabulary?

A. Yes, sir.

FISCAL. Nothing more.

215 Cross-examination by counsel for defense:

Q. Were you with the defendant on the night of Thanksgiving Day?

A. Yes, sir.

Q. And on that day?

A. Yes, sir.

Q. Was Mr. Pendleton with you until an advanced hour of the night?

A. Yes, sir.

Q. And were you people drinking all that time?

A. Yes, sir.

Q. Did you observe anything during all that time in regard to the condition of Mr. Pendleton, as to whether he was in such a condition that he could not govern himself?

A. No, sir.

Q. Showing you Exhibit A, which is the photograph of the carromata you have mentioned, state whether this photograph is exact.

A. Yes, sir; it is.

Q. On the night between Friday and Saturday, did you not see him using that carromata?

A. No, sir.

Q. And it was returned to you by the constabulary?

A. Yes, sir.

Q. When it was delivered to you, did you see it personally or not?

A. Yes, sir.

Q. Do you know the dimensions of that carromata?

A. Yes, sir; I have measured it.

Q. Can you tell me from memory, or have you brought a memorandum, the measurements of the carromata and the diameter of the wheels?

216 A. I have them at the office but not here, and I can not state them now.

Q. Please bring them this afternoon.

A. Yes, sir.

Redirect examination by the FISCAL:

Q. What do you mean to say by saying that the accused did not show that he was not incapable of governing himself; that he was not drunk, or that his drunkenness was not sufficient to deprive him of the use of his faculties?

A. I can not state anything with respect to the condition in which his mental faculties were. He was drinking; he was drunk, but he could govern himself; he could walk.

Recross-examination by counsel for defense:

Q. Do you mean to say that, although he could govern himself and could walk, that he did not know what he was saying?

A. He was drunk, but I suppose that he knew what he wanted to say.

Q. When you saw him the last time, had the drunkenness become dangerous for others?

A. No; not that I saw.

Q. When you saw him the last time, was there a driver in the carromata?

A. No, sir.

Q. Who was the driver for that carromata?

A. I myself.

NOTE.—It is admitted by both parties that the carromata used by the defendant belonged to Mr. Nichols.

217 JANUARIO BACLAC; resident of San Nicolas; single; 23 years of age; municipal policeman; being duly sworn, testified as follows:

(Counsel for defense objects to the presentation of this witness for the same reasons stated with respect to the first witness. The fiscal asks that the objection be overruled, giving the same reasons stated with regard to said first witness. Court overrules the objection and the counsel for defense excepts.)

Direct examination by the FISCAL:

Q. On the night of November 30th last, the official holiday, were you on guard or not?

A. I was on duty.

Q. Where?

A. In Plaridel street.

Q. At what time?

A. Between twelve and six in the morning.

Q. State whether you met a constabulary man running with a gun about two or two-thirty a. m.

A. Yes, sir; I saw him.

Q. State what happened and what he said to you, if anything.

A. When the policeman was a short distance from me he called to me, saying, "Policeman, take care. Hide yourself, because our lieutenant has just shot a policeman in San Nicolas." When he told me that I tried to stop the constabulary man, but he told me not to stop him, because he was in a great hurry to return to the quarters in order to give notice of what had happened to the policeman whom the lieutenant had just shot.

FISCAL. That is all.

218 Cross-examination by counsel for defense:

Q. What is the name of that constabulary man?

A. I do not know.

Q. Where did you meet him?

A. In the place where I was on duty.

Q. In what street were you on duty?

A. In the barrio of Pili.

Q. Can you not locate the place with reference to some house or building which you know?

A. There is a store; I can not state whether it belongs to a Spaniard or not, with European goods, among which there are shoes.

Q. Do you know where the plaza in front of the townhall is?

A. Yes, sir.

Q. Is it near that plaza?

A. It is not far from there.

Q. Do you know where the street Magallanes is?

A. As I am new and have just become a policeman, I do not know the streets well. I can only state where the street is where I was stationed.

Q. Do you know where the Church of the Santo Niño is?

A. Yes, sir.

Q. How far from that church is the street where you met the constabulary man?

A. As far as from here to the wall.

Q. On the same street which leads to the Church of the Santo Niño and to the townhall between the church and the plaza?

A. Yes, sir; it was there.

Q. Do you know where the American saloon, belonging to Mr. Kipp, is?

219 A. No, sir.

Q. Do you know where they are building the new houses on the street between the church and the plaza?

A. Yes, sir.

Q. Was it near one of those houses under construction?

A. About there; not very near.

Q. Are you sure that the man had a gun?

A. Yes, sir; he was carrying a gun.

Q. And you ordered the constabulary man to halt?

A. Yes, sir; but he told me that he could not, because he was in a great hurry to give the notice to the quarters of what had happened, and he, after he had talked about the affair, went to inform our chief.

Q. Did he tell you that the defendant was out driving or that he was going to pass by that place where you were?

A. Yes, sir; he told me that if he should pass by there, that if a carromata, without a light, came by he said, "Do not try to stop it, for fear that they might shoot you also."

Q. But did he tell you that the defendant was going to pass by that place where you were?

A. No; he did not tell me so, but that if he should pass by I should not order him to halt, but on the contrary that I should avoid him.

Q. At what hour did you see the constabulary man?

A. Past three.

Q. How much past three?

A. Less than a quarter of an hour after three.

HARVEY P. NEVILL, 29 years of age, major of constabulary, province of Cebu, being duly sworn, testified as follows:

220 Direct examination by the FISCAL:

Q. Do you know the accused?

A. Who is the accused?

Q. The accused in the present cause.

A. Yes, sir.

Q. Was he ever an officer of constabulary?

A. Yes, sir; he was.

Q. Was he an officer while you were major at this constabulary post?

A. Yes, sir.

Q. Was he an official of the constabulary November 30th and December 1, 1905?

A. Yes, sir.

Q. Was he in command of any post, or not?

A. At that time he was in command of the Cebu post.

Q. As officer of the constabulary, did he have any duties relative to the fulfilment of orders here in the city, or in any affair relative to public order, unless he should have some special orders?

COUNSEL FOR DEFENSE. I object to the question because it is a legal question, and as it treats of a matter of written orders, the orders would be the best proof.

FISCAL. I refer to special orders, and as to whether the Major has given any special orders with regard to public order.

COURT. Let the witness answer yes or no.

A. No, sir; I did not give any.

FISCAL. That is all.

221 Cross-examination by the counsel for defense:

Q. Did you see the carromata which was used by the defendant on the night of December 1st?

FISCAL. I object to the question as improper cross-examination.

COURT. He may answer.

FISCAL. Note an exception.

A. Yes, sir; I saw it.

Q. Did you examine the carromata?

A. I examined it December 1, in the morning.

Q. What did you find in the carromata?

A. I found the ordinary things which are in a carromata, under the seat—a cape and some clothing belonging to the driver.

Q. Nothing more?

A. I do not remember anything more.

Q. Have you been in the place where the policeman was killed since the affair occurred?

FISCAL. I object to the question as improper cross-examination.

COURT. Objection is sustained.

COUNSEL FOR DEFENSE. Note an exception.

Redirect examination by the FISCAL:

Q. Did you see any holes in the top of the carromata?

COUNSEL FOR DEFENSE. I object to the question as improper cross-examination.

COURT. He may answer the question.

222 COUNSEL FOR DEFENSE. Note an exception.

A. Yes; I saw any holes in the curtain of the carromata.

Q. Were there any scratches or holes?

A. A hole produced, as I think, by some instrument which was not a cutting instrument, more or less triangular in shape, but irregular,

produced by a punch with some instrument which, as I saw, was not a cutting instrument.

FISCAL. Nothing more.

The prosecution rests its case, reserving, however, as part of the direct proof, an ocular inspection by the court, with the formalities of law, of the carromata which was used by the defendant and also the place where the act occurred; and the counsel for defense not making any objection to this reservation of proof on the part of the prosecution, the proofs of the prosecution are closed and the session is adjourned until nine a. m.

223 TENTH SESSION.

The continuation of the hearing of the present case was called Jan. 4, 1906, at 9.00 a. m., there being present the persons named at the beginning, and the following proofs were presented:

Witnesses for the defense.

HARVEY FRANK CAMERON; civil engineer; resident of Cebu; 32 years of age; married; native of the United States; being duly sworn, testified as follows:

Direct examination by counsel for the defense:

Q. How long have you been in Cebu?

A. Eleven months.

Q. Examine Exhibit F and state what it is.

A. It is a plan or sketch of the district of San Nicolas, Cebu, Philippine Islands, made by me, and measured on Sept. 5, 1905.

FISCAL. According to article 39 of General Order 58, I ask the court that the witnesses for the defense be excluded.

COURT. In view of the fact that the witnesses now present are personally known by the court, the court overrules the motion, this exclusion referring only to said persons.

FISCAL. Note an exception.

Q. Does that plan show the various distances which are marked on it?

224 A. Yes, sir; they are measurements taken by me, and it is exact in regard to that particular.

Q. What is the scale?

A. One inch to twenty feet.

Q. How did you find the place where the house of Mr. Kempsky is?

A. By asking the people who lived in it.

Q. Do you work as a civil engineer?

A. Yes, sir.

Q. In what way and in what capacity?

A. For J. G. White & Co.

COUNSEL FOR DEFENSE. I offer as proof the plan presented by the witness.

COURT. The proof offered is admitted, marked "Exhibit F" of the defense.

The FISCAL. No cross-examination.

WILLIAM J. MOZART; civil engineer; native of the United States; resident of Cebu; married; 50 years of age; being duly sworn, testifies as follows:

Direct examination by counsel for defense:

Q. How long have you been in Cebu?

A. Seven months.

Q. What is your business in Cebu?

A. Civil engineer for White & Co.

Q. Were you in Cebu December 1, 1905?

A. Yes, sir.

Q. Were you present on the morning of that date in the place where it is said that a policeman was killed?

225 A. I was there about midday.

Q. Who was with you in that place?

A. Major Nevill, Captain Manchester, of the constabulary, Mr. Tatum, and two constabulary soldiers, Grava and Montero.

Q. What object had you people in going to that place?

A. It was at the request of Mr. Nevill, in order to note down some information in regard to the supposed assassination of the policeman.

Q. Do you know for what reason Grava and Montero went there?

A. Because these two had told Major Nevill that they were present in that place when the policeman was killed.

FISCAL. I object to the answer as hearsay.

COURT. The court sustains the objection in regard to Montero, and orders that the answer of the witness in regard to Montero be stricken out, and with reference to Grava it may remain.

COUNSEL FOR DEFENSE. Note an exception to the first part of the ruling.

Q. Examine this plan, marked "F," and state if it represents the exact position of the house and the streets so far as you have observed.

A. I did not make the measurements personally, but I was in that place, and in my judgment the measurements are exact.

Q. State if you found any indication on the ground concerning the death of the policeman that morning.

A. There was blood on the ground pointed out by Montero and Grava as the place where the policeman fell.

FISCAL. I ask that this be stricken out, as the witness did not see the occurrence of record.

226 COURT. Objection sustained.

COURT. What did you see?

A. I saw spots of blood on the ground.

Q. How large were those spots?

A. They formed stains on the ground about twenty inches in size.

Q. Do you mean to say that there was a pool of blood, or various spots?

A. There were various spots.

Q. How far were the spots of blood from any point marked on this sketch, and in the affirmative case, state the precise distance.

A. From this point which indicates a post, ten feet, and at a right angle eight [the witness points to the plan].

Q. What other examination did you make of the ground?

A. Nothing more.

Q. Did you look for bullets in that place?

A. Yes, sir.

Q. Did you look for blood spots in other places?

A. Yes, sir.

Q. What was the place which you saw on the ground as the place of the occurrence or which would serve as proof of the occurrence?

A. The soldier showed me a place where they said the revolver of the deceased man was.

COURT. What soldier?

A. Montero.

FISCAL. I object to this proof, because Montero is not a witness in this cause.

227 COURT. Objection sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. How far from the spots of blood and in what direction was the place pointed out to you as the place where the revolver was found?

FISCAL. The same objection.

COURT. The objection is sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. In the investigations made by you and made in your presence was anything found which might have the character of proof in this cause?

A. Nothing more, that I remember.

Q. Were you present the morning of that same day in the street Colon in the quarters?

A. I was present.

Q. Did you examine a carromata?

A. Yes, sir.

Q. Do you know whose carromata that was?

A. I was told it belonged to Mr. Nichols.

FISCAL. I ask that the answer be stricken out as hearsay.

COURT. Objection sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. Who told you that?

FISCAL. Same objection.

COURT. He may answer who told him so.

A. Major Nevill.

228 Q. What did you find inside the carromata, if anything?

A. I found a straw hat, a rubber cape, folded up, and a blue paper for wrapping candles.

Q. Did you observe if the curtains were in place on both sides of the carromata?

A. They were practically in the same shape as shown in Exhibit 2.

COUNSEL FOR DEFENSE. That is all.

Cross-examination by the FISCAL:

Q. What interest did you have in the affair that you should go to make investigations which you made?

A. Because Major Nevill invited me to go.

FISCAL. I ask the court that the testimony of this witness be stricken out, for the reason that the testimony given by him with regard to the place in question was on the basis of hearsay of what was said by Grava and Montero.

COURT. Motion is overruled.

ERNEST NICHOLS, before sworn in this cause, was recalled on part of the defense.

Direct examination by counsel for defense:

Q. Have you the details of the measurements of your carromata to which you referred in your former testimony?

A. Yes, sir: I have them.

Q. State the diameter of the wheels of the carromata.

A. Six feet six inches.

Q. How far is the wheel from the body of the carromata?

A. Eleven inches.

229 Q. How wide is the carromata behind?

A. Two feet ten inches.

Q. How high from the ground is the seat of the carromata, or, that is to say, the height of the rear of the carromata?

A. Five feet.

Q. How high is the cushion of the seat from the ground?

A. Three feet nine and one-half inches.

Q. What is the distance between the seat of the carromata and the nearest part of the driver's seat?

A. One foot seven and one-half inches.

Q. How wide and how long is the driver's seat?

A. It is one foot seven inches long from side to side, one foot two inches wide from front to back.

Q. How wide are the curtains?

A. Three feet six and one-half inches at highest part; at the middle, by the lamps, two feet, and below, one foot ten inches.

Q. What are the measurements of the seat inside the carromata?

A. Two feet nine and one-half inches long from side to side and one foot and four *and* inches wide.

Q. How wide is the window behind?

A. One foot three and one-half inches wide, and at the upper part, behind the seat, one foot and six and one-half inches.

Q. What is the distance from the rear wheel?

A. One foot six inches.

Q. How long from the spokes of the wheel to the hub?
A. Five and one-half inches.
Q. How long are the two curtains at the sides of the rear window?
A. Nine and one-half inches.
230 COUNSEL FOR DEFENSE. That is all.

Cross-examination by the FISCAL:

Q. How did you take those measurements?
A. By means of a meter rule.
Q. Are the inches English or Spanish inches?
A. English.
Q. Are you experienced in taking measurements?
A. Yes, sir.
Q. Can you assert that those measurements are exact?
A. Yes, sir.
FISCAL. That is all.

LUCIANO BACAYO, 32 years of age, municipal president, resident of San Nicolas, being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. How long have you lived in Cebu?
A. Since I was born.
Q. Are you the president now?
A. Yes, sir; I have been president since September, last year.
Q. Did you know the deceased policeman, Leoncio Onabia?
A. Yes, sir.
Q. As president, are you chief of police of this town?
A. Yes, sir.
Q. How long had the deceased been on the police force of this town?
A. I do not remember at this moment. He served about two
231 years ago, but he asked for a vacation to visit his family, and afterward he returned, about July last year—about that time. I do not remember exactly.
Q. What is the deceased man's town?
A. He is from Mingalnilla of this province, Cebu.
Q. Do you know whether he was a Tagalog or Visayan?
A. He was not Tagalog.
Q. Was he Visayan?
A. Yes, sir; of the province of Cebu.
Q. By whose recommendation did he become a member of the police force of Cebu?
FISCAL. I object to the question as incompetent and irrelevant.
COURT. Although the court agrees to the objection of the fiscal that the question is irrelevant, he will permit the question to be answered, reserving the right to cut off such question in the future.
A. I do not know whether he was admitted to the police force by reason of any influence, because, as I say, when I took charge of the presidency he was serving already as a policeman.

Q. Do you know the place where the policeman was killed?

A. Where he fell, no; the street, yes.

Q. Do you know the street Panay from the bridge of the revolution to the street Panay?

A. Yes, sir.

Q. Starting from the bridge and going toward the street Panay are the houses on both sides of the street Padilla large or small?

A. There are some of mixed material, but the greater part are built of light materials.

232 Q. Are there any houses situated on the land belonging to the church?

A. None.

Q. Examine Exhibit F and state whether on the street Padilla in front of the ground belonging to the church, there are many houses.

A. There are some, but not many.

Q. Do you know whether there is a house said to belong to Nicolas Godinez on Padilla street, between Calamba and Panay streets?

A. Almost halfway between Calamba and Panay streets there is a house belonging to Nicolas Godinez, on the street Padilla.

Q. Is it the one indicated in this plan as the resident of Mr. Kemsky?

A. I do not know whether that is the gentleman who lives in the house, but an American lives there, and the house is well located on the plan.

Q. Do you know who lives in the house in front of the house of Nicolas Godinez, which is marked on the plan as a nipa house, a little farther to the west?

A. Yes, sir; one Luis Padolina. There are two houses which form a store and in the other is a person called Misian, but I do not know her surname.

Q. What is the name of the female baker: Mauricia Nolasco?

A. It is she. It is in that same house that the female baker lives.

Q. Is the house of that person marked on this sketch as a nipa house?

A. The house of Luis Padolina is one of the houses which is not marked here on the sketch.

233 Q. How far is the house of Nicolas Godinez from the street Panay?

A. I believe that it must be more than fifty meters, approximately, but I do not know the exact distance.

Q. Do you live on Padilla street?

A. Yes, sir.

Q. How far to the west of Panay street do you live?

A. I live on the corner near Carlock street.

Q. How many streets are there between Carlock and Panay?

A. One.

Q. Is the block between those two streets last named as large as the church block?

A. It may be.

Q. What is the name of the continuation of Padilla street to the east from the bridge of the revolution?

A. Colon or Theater.

Q. How long is Colon street toward the east from the bridge?

A. I can not calculate the distance.

Q. From Calamba street to the bridge of the revolution are there any street lights?

A. Four or five.

Q. Are they the ones marked here on Exhibit F by the distances between them?

A. From the bridge of the revolution to Calamba street there are four or five street lights which are not marked on the sketch.

Q. How far is it from the bridge of the revolution to the hippodrome?

A. It must be sixty or seventy meters.

Q. And how far from the hippodrome to the theater?

A. I do not know how many hundred meters.

234 Q. What is the name of the street which runs from the bridge of the revolution to the bridge Concordia on the east.

A. Pananiba.

Q. What is the name of the street which runs east from the bridge Concordia in this direction?

A. Magallanes street.

Q. What is the name of the street which is on the west of the bridge Concordia?

A. Tupas.

Q. Is the street which runs in front of the church of San Nicolas the same which passes the Recoletos?

A. The street Tupas is a continuation of Magallanes street toward San Nicolas. The church of the Recolets is on Magallanes street and Tupas street is a continuation of it.

Q. Is it one of the principal streets of transit of Cebu?

A. Yes, sir; it is.

Q. The street Balintanag runs from Magallanes street to Colon, does it not?

A. Yes, sir.

Q. What is the first street on the west on that street; the one which passes the French restaurant?

A. Carmelo street.

Q. Is Luzon street on the east of the bridge?

A. Yes, sir; on the east of the bridge.

Q. And it runs from Magallanes to Colon?

A. Yes, sir; it is a street which crosses Magallanes and Colon streets.

Q. And the third of April is on the other side of the bridge, on the west side?

A. Yes, sir.

235 Q. And next to this street and parallel to it is the street Lacondola?

A. I do not remember at this moment, but I believe so. It was formerly Infanta street.

Q. And the street which runs along the land of the church toward the west is Calamba?

A. Yes, sir.

Q. And the one next to it and parallel with it is Panay?

A. Yes, sir.

Q. How far is it from Balintauag street to the street?

A. The distance is very great and I can not estimate it exactly.

Q. From Balintauag street to Panay street is at least the same distance as from the plaza to Panay street.

A. I do not know whether it is one-half, but it is nearer from Balintauag street to the townhall than from Balintauag street to Panay street.

Q. Examine Exhibit G and state whether the name of the streets and plazas in Cebu are correct as shown in it?

A. There are some streets here which I do not remember whether they are the same; but the majority of these are the new and old names, because there are included here some lanes which formerly did not have a name, but I agree to the majority of them.

COUNSEL FOR DEFENSE. I offer this exhibit as proof.

FISCAL. I object because it is not identified, and it has not been proven that the list is correct.

COUNSEL FOR DEFENSE. Are all the names of streets which appear here in exact correspondence with the old names?

236 A. Yes, sir, but there are some which have only been named recently which did not have names formerly.

COURT. The court admits the list with the exception of the names of the streets Pampan, Bagumbayan, and Asturias. The witness having admitted that the other names of streets which are on the list are correct with regards to the former names.

Q. Were you acting president before you were elected?

A. Yes, sir.

Q. Is it not true that in the part of the city included within the street Balintauag to the market of San Nicolas many robberies and thefts have occurred during the last six months?

FISCAL. I object to the question as irrelevant and immaterial.

COURT. Objection sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. Is it not true that between two and four o'clock a. m. many robberies have been committed in that place during that time?

FISCAL. The same objection.

COURT. Objection is sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. Where were you the morning of December 1, 1905?

A. At home.

Q. At what hour of the morning did you leave your house?

A. If I remember correctly it was between three and four a. m.

Q. Can you not state the hour exactly?

A. I can not state it exactly at this moment.

237 Q. Why did you leave your house at that hour?

A. I was awakened by the telephone. On approaching it they told me from the San Nicolas station that a policeman had been killed by a shot fired by a constabulary officer. Then I asked where and they answered that it was on Padilla street. Immediately I dressed, took my revolver, and left the house.

Q. A Colt's 45 revolver?

A. Bulldog.

Q. 45?

A. I do not remember.

Q. Was it a matter of no importance for you to remember the hour when you left your house?

A. I did not pay attention to it, because I was rather frightened when they told me that a policeman had died, and I at once dressed without looking at the clock.

Q. When you left the house where did you go?

A. On leaving the house I took with me the policeman who was stationed at the house and other who was stationed on Carlock street. I took the two along with me and we went toward the place where the affair occurred, and on the road I learned that the officer had returned to the same place where the affair occurred with constabulary men and from a distance I heard a whistle. I believe that it was a police whistle, because before leaving the house I had asked the townhall to send me a squad of policemen, and after a moment, and before reaching Panay street, I heard the voice of an American, who called out to me "Halt," from a distance, and at the same time the noise of the guns which appeared to me to be loaded. One of the policemen cautioned me to go on the other side and to take another street, be-

238 cause it would be useless to place ourselves in front of the constabulary, because there were many of them and there were only three of us. I agreed to that and told the policemen to turn about and we passed down Panay street to go toward the San Nicolas police station, and on arriving there I spoke to the chief of police by telephone, asking him for the squad of policemen which I had already asked for, as they had not yet arrived.

Q. Was that whistle which you heard to call for the aid of the police?

A. No, sir; a whistle, nothing more.

Q. The same kind of a whistle the policemen use?

A. No, sir; stronger than the ones which the policemen have.

Q. Before that time have troubles occurred on the streets of Cebu between the constabulary and the Cebu police?

A. I do not remember of any in my time; no, sir.

Q. But you know or you remember that at some time such troubles as I refer to have occurred?

A. No, sir; I do not remember.

Q. Did you make an ocular inspection of the place of record after the affair occurred?

A. No, sir; not personally.

Q. Did you order that an autopsy of the deceased be held?

A. Yes, sir; I gave the municipal physician verbal orders.

Q. From the time you left your house until you reached the station did you meet anyone?

A. I met the policemen. I believe there were two. I met them on Panay street. I took the two with me and met two others on Panay street.

COUNSEL FOR DEFENSE. That is all.

239 Cross-examination by FISCAL:

Q. Is your former residence on the street where you now live, or on another?

A. On another.

Q. Where is your old house?

A. On Tupas street.

Q. Near or far from Panay street?

A. It is on Panay street between Panay and Tupas.

Q. When you were in the San Nicolas station, did you me't any constabulary man?

A. Yes, sir.

Q. Do you remember who he was?

A. One, Grava, with his companions.

Redirect examination by counsel for defense:

Q. Do you know what time it was when you met Grava and his companions?

A. Before four o'clock.

That is all.

AGRIPINO NOLASCO; married; 35 years of age; baker; resident of San Nicolas; being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. Do you know the place where it is said that a policeman was killed in the early hours of December 1st on Padilla street?

A. Yes, sir.

Q. How far do you live from the place where the policeman was killed?

240 A. About twenty steps, more or less.

Q. Do you know where Mr. Kempsky lives?

A. It is near the place where the policeman fell.

Q. With respect to the house where Mr. Kempsky lives, where is your house?

A. Going toward El Pardo, my house is on the other side of the house in which Mr. Kempsky lives.

Q. At what hour did you leave your house that morning?

CLOSE IN CENTER

A. Six a. m.

Q. Was it quite light then, so as to be able to see what there was on the ground?

A. I saw blood in the street in the place where the policeman was killed, but he was no longer there.

Q. What else did you find in that place?

A. I also saw a shoulder strap and some empty shells.

Q. How many empty shells did you find?

A. Two empty shells and one loaded with ball.

Q. How far from the place where the blood was was the shoulder strap?

A. About four or five paces.

Q. Did you measure the distance from the place where you found the shells to the corner of the house where Mr. Kempsky lives and the street light?

A. No; I did not measure it.

Q. Did you go with Mr. Tatum and *and* an American employee to that same place to measure the distance?

A. I saw that they were measuring, but I did not measure.

Q. But you showed them the place where you saw those objects to which you refer?

A. Yes, sir.

Q. And you also pointed out to them the place where the blood was?

241 A. Yes, sir.

Q. How far apart were the empty shells and the loaded cartridge?

A. They were in one place together.

Q. Did you pick up these shells?

A. I picked them up and delivered them to two policemen.

Q. Do you know the names of those two policemen?

A. I know their faces, but not their names.

Q. Where was the policeman when you delivered the shells to him?

A. There in that place where the affair occurred.

Q. That same morning?

A. Yes, sir.

Q. Did you see Mr. Tatum and the employee measuring the distances?

A. Yes, sir.

Q. Did you see them taking notes of the distances measured by them?

A. Yes, sir.

Cross-examination by the FISCAL:

Q. What kind of shoulder straps did you find?

A. A shoulder strap of a constabulary officer.

Nothing more.

EMETERIO MONTERO: resident of San Nicolas, Cebu; single; twenty years of age; constabulary soldier; being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. Were you present when the corpse of the policeman was picked up in San Nicolas?

242 A. Yes, sir.

Q. What did you do in regard to picking up the corpse of the deceased.

A. As I was in charge of the expedition when we went there, by order of Mr. Pendleton, I ordered the corpse to be put into the carromata.

Q. Who else helped to do that?

A. Tecson, Ruiz, Gabato; only those three.

Q. Were you one of the constabulary who went on foot or in the carromata?

A. On foot.

Q. How long after the carromata reached the place where the corpse was did you and your companions who went on foot arrive there?

A. More than five minutes.

Q. When you arrived was the corpse already loaded into the carromata?

A. Not yet.

Q. Did you pick up a revolver on the ground near the corpse?

A. Yes, sir.

Q. How far was the corpse from the revolver?

A. Two yards.

Q. In what direction did you find the revolver; toward the street Calamba or the street Panay?

A. Toward the place where Trini's house is. I do not know Panay or Calamba streets.

Q. In the direction toward the church, or in the opposite direction?

A. Toward the church.

Q. Did you not pick up the revolver halfway from the corpse to the corner of the street by the church?

243 A. No, sir.

Q. Were you in that place that morning with Major Nevill, Mr. Mozart, and other persons to take measurements?

A. Yes, sir.

Q. Did you show those two the place where you found the revolver?

A. Yes, sir.

Q. Was the place indicated by you as the place where you picked up the revolver the same place where you found it?

A. Yes, sir.

Q. When you reached the place where the corpse was, how did you find it; across the street, or parallel to it?

A. Lying partly across it.

Q. Was the head toward the right or toward the left, going toward El Pardo?

A. Toward the right.

Q. How far from the fence?

A. One yard.

Q. Was it on the same side as the house of Mr. Kempsky?

A. Yes, sir.

Q. And closer to the fence on one side of the street than that on the other?

A. Closer to the left, going toward El Pardo.

Q. How far from the fence near the house of Mr. Kempsky was the head of the corpse?

A. At least eight or ten yards.

COURT. Court adjourned until 3.00 p m.

ELEVENTH SESSION.

244 The continuation of the hearing in the present cause was called January 4, 1906, there being present those named at the beginning of this record, and the following proofs were presented:

Testimony of Emeterio Montero.

Cross-examination by the FISCAL:

Q. Did you go with the lieutenant the second time that he was in the quarters?

A. Yes, sir; I followed.

Q. And being there in the place where the corpse was, did the defendant try to spot you with the blood of the corpse?

A. Yes, sir.

Q. When the corpse had been picked up—on picking it up from the ground, what did you do?

A. When he took hold of my hand I understood that he was going to spot me and I backed and he said "No matter, it doesn't hurt any."

COUNSEL FOR DEFENSE. I object to this manner of examining the witness, and ask that the answer be stricken out as improper cross-examination.

COURT. Objection is overruled on the ground that the witness was called by the defense.

COUNSEL FOR DEFENSE. Note an exception.

WILLIAM MOZART, being before sworn, was recalled, and testified as follows:

Direct examination by counsel for defense:

Q. State whether anyone pointed out to you the place where the revolver was found, and, in the affirmative case, who it was point it out to you.

245 A. Yes, sir; a constabulary soldier pointed out to me the place where the revolver was found.

Q. Do you know his name?

A. Yes, sir; he was called Montero.

Q. Indicate on the plan the place where it was pointed out to you.

A. Seventy-five or eighty feet and in the same street beside the fence.

Q. Who were present?

A. Major Nevill, Captain Manchester, Mr. Tatum, I, and one of the constabulary men whose name I do not remember.

COUNSEL FOR DEFENSE. That is all.

Cross-examination by the FISCAL:

Q. How do you know that that is the place which you have just designated; did you make any mark on the ground?

A. No, sir; merely by the measured distances.

Q. How many times have you been in that place besides that time?

A. I have been there two or three times, I suppose; I can not state exactly.

Q. But have you made any other examination of it besides the time that you have testified that you made it?

A. No, sir.

Q. Were those measurements which you have made only an estimate based on that one time that you were there?

A. Yes, sir; I noted down the places with regards to the house very carefully.

FISCAL. That is all.

246 D. C. TATUM, resident of Cebu, [illegible] years of age, native of the United States, photographer, being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. Have you been in the place in San Nicolas where it is said that a policeman was killed December 1st, last year?

A. Yes, sir.

Q. Examine Exhibit B and state how it was made; under what circumstances it was made.

A. I made it myself because Mr. Sleeper called me, as a photographer.

Q. What does that photograph represent?

A. The photograph was taken with the object of showing the street light and the different houses in the place where the policeman fell dead and also the house of Mr. Kempsky.

Q. Is this photograph a true and correct representation of the streets and the houses at the scene of the occurrence?

A. Yes, sir.

Q. At what point did you place the camera to take the photograph?

A. At the head of the street which runs toward the north from the church and comes out by the public school.

COUNSEL FOR DEFENSE. I offer Exhibit B as proof in this cause.

FISCAL. I object to this being offered, as impertinent and immaterial.

COURT. Objection overruled and proof admitted.

FISCAL. Note exception.

247 COUNSEL FOR DEFENSE. I also offer as proof Exhibit E to reproduce the same street, but taken nearer the place photographed.

FISCAL. Same objection.

COURT. Objection overruled and proof admitted.

FISCAL. Note exception.

Q. Examine Exhibit A and state under what circumstances it was made.

A. I made this photograph.

Q. What does this photograph represent?

A. It represents the carromata of Mr. Nichols. It is a view taken at the side of the carromata.

COUNSEL FOR DEFENSE. I offer this photograph as proof.

FISCAL. Same objection.

COURT. Objection overruled and proof admitted.

Q. Were you in the place where the policeman was killed after having made these photographs?

A. Yes, sir.

Q. With whom were you there?

A. With my servant.

Q. Were you with Agripino Nolasco?

A. Yes, sir.

Q. What did you people do there?

A. We took measurements, and my servant, another person whose name I do not know, and I were taking measurements from the street light to the place where the empty shells and revolver were found.

Q. Do you remember the distance from the street light to the place where the empty shells were found?

248 A. At present I can not remember it, but the distance was taken in inches.

Q. But did you take the measurements then?

A. Yes, sir.

Q. Do you remember whether the notes which you took were correct?

A. Yes, sir.

Q. Examine this memorandum and refresh your memory.

A. It is my handwriting.

Q. Can you state, by looking at that memorandum, the distance from the street light to the place where the shells were picked up?

A. Fifteen feet.

Q. What is the distance from the street light to the place where the shoulder strap was found?

A. Seventeen feet.

Q. What is the distance from the place where the shoulder strap and the shells were found to the entrance door of the house?

A. Twenty-one feet nine inches.

Q. How do you know that the shoulder strap and the shells were picked up in that place?

A. They were pointed out by Agripino.

FISCAL. I ask that the answer be stricken out as hearsay.

COURT. Motion is denied.

Q. How long does it take to go in a carriage from the constabulary quarters to the place where the policeman was killed, in a carromata which goes at an ordinary gait?

A. Six minutes.

249 Q. And how long from the quarters returning on San Nicolas street, Tupas street to the corner of a store and from there to the quarters?

FISCAL. I object to the question as impertinent.

COURT. Objection overruled.

FISCAL. Note an exception.

A. Eight minutes.

Q. How much nearer is the bridge of the revolution to the place where the policeman was killed than from the bridge to the hippodrome?

A. I can not judge it well, but I believe that the entrance to the hippodrome is a hundred yards nearer than the other distance.

Q. How many street lights are there, if you know, between the bridge and the place where the policeman was killed?

A. Six.

Q. Were you present with Major Nevill and other persons in the place where the policeman was killed?

A. Yes, sir.

Q. Did you see Montero point out the place where the revolver was?

A. Yes, sir.

Q. Indicate on Exhibit F the place where he pointed.

A. Here, in front of where it says "Bamboo and nipa house."

Q. Who were present?

A. Major Nevill, Mr. Mozart, Lieutenant Foss; although I can not assert that this lieutenant was there, but only believe that he was there.

COUNSEL FOR DEFENSE. Nothing more.

250 Cross-examination by the FISCAL:

Q. How did you take the measurements which you have just stated?

A. By means of a metric tape.

Q. Why did you take those measurements?

A. At the request of Mr. Sleeper.

Q. Are you certain those measurements are correct?

A. The measurements are exact according to the indications given by Agripino.

Q. When Agripino gave you the information about the place where the shells were found, were they at the place or not?

A. No, sir; they were no longer there.

Q. Was there any sign on the ground put there by Agripino which would show that the shells had been in the place?

A. I did not see any sign. I only estimated it by the spots of the blood.

Q. In the place pointed out as the place where the revolver was found was there any sign which would indicate that the revolver had been there?

A. No, sir; there was not.

Q. Look at the photograph taken with the camera. Can you as a person expert in photography assert that the object is faithfully photographed?

A. Yes, sir.

Q. Can not cameras show copies a little different from the places or objects photographed?

A. I took this picture with a view camera, and unless a double exposure is made, and if the time is correct, there is no difference whatever, and no change at all is made in the thing photographed.

251 The only thing that would make a material difference would be a double exposure.

Q. How did you count the minutes of time employed in going over the distances about which you were asked?

A. By my watch.

Q. But how fast was the vehicle going?

A. The ordinary gait of a carriage. I did not say anything to the driver.

Q. But was the horse going on a walk?

A. At an ordinary, steady walk.

Q. A Philippine or American horse?

A. Philippine.

Q. What horse?

A. A hired horse; I believe that it was Mr. Roberts'.

That is all.

HARVEY P. NEVILL, having been previously sworn in this cause, was recalled on part of the defense, and testified as follows:

Direct examination by counsel for defense:

Q. On the morning when you were in the place of record, after the death of the policeman, did Montero point out to you the place where the revolver was found?

A. Yes, sir; he pointed it out to me.

Q. Who were present then?

A. Mr. Mozart, Mr. Tatum, I, Montero, another soldier called Grava, and I do not remember whether other soldiers were present.

Q. Was Captain Manchester there?

A. He was also there.

Q. Where is that captain?

A. He has gone to Manila.

252 Q. Examine the plan and show the court the place where Montero indicated to you as the place where the revolver was found.

A. The place indicated to me by Montero as the place where the revolver was found is fifty or sixty feet from the place shown in the map as a nipa house.

Q. Who invited Mr. Mozart and Captain Manchester to be present there; for what reason?

A. I did.

Q. Why?

A. So that they should be witnesses in the cause; witnesses who could give material evidence in the cause, being able to discover some proof in it.

Q. You have stated that you examined some holes in the roof of Mr. Nichols' carromata; can you identify the roof of that carromata which is now shown to you [showing witness two pieces of oilcloth which apparently represent the roof of the carromata]?

A. In my opinion it is the same.

Q. Are these the same holes which you saw in it?

A. In my opinion they are the same.

Q. Do you believe that those holes were made by a shot from a gun?

A. In one of the holes there is a place which seems to indicate that it was made by a ball.

Q. But can you state that it was made by a ball?

A. I can not affirm that.

COURT. Let the record show that the part of the roof to which the preceding questions refer and which was shown the witness is the lower part of the roof; that is to say, the inside of it.

Q. Have you examined the upper part of the roof, or, that is to say, the exterior of the roof, of the carromata?

253 A. No, sir.

Q. Supposing that this is the upper part of the roof of the carromata, were those holes made by a ball?

A. They appear to indicate that they were made by a ball. That is supposing no other means was employed to imitate them.

Q. In case the hole was made by a ball, would there necessarily be powder marks?

A. In stuff so soft as this, I do not know.

Q. In your judgment these holes were made by a ball, supposing that it is the upper part of the roof?

A. In my judgment the holes which are shown me are not such as it might be supposed were made by a ball, but the greatest indications that they were made by a ball are the marks which appear to be powder marks.

Q. When a shot is fired at a distance of a few inches do not the holes take this form?

A. I have had no experience as to the effects of balls on this material. The effect is different with different materials.

Q. But you can say, without much doubt, that the condition of these holes they were made by a ball, and in case they are such the upper part of the roof of the carromata is in the same condition as it was when taken from the said carromata?

A. No, sir; I can not answer with assurance. I can not assert anything about this kind of material. I would not expect that the holes made by a ball would have the shape which these holes which are shown to me have. The only thing which indicates to me that they were made by a ball are the marks which resemble powder stains.

Q. What arms did the constabulary carry and do they carry?

A. Springfield, 45 carbine.

254 COUNSEL FOR DEFENSE. That is all.

Cross-examination by the FISCAL:

Q. When Montero pointed out to you the place which he said was the place where the revolver had been found, was there any mark or sign which would show that the revolver had been in that place?

A. No, sir; I believe not.

FISCAL. I desire that the court cause it to appear in the records that the interior part of the roof of the carromata shows two large holes and another smaller one, almost in the center, but a little nearer the seat, and that in what is said to be the upper part there are two holes which correspond with the two larger holes.

COURT. Let the record so show.

FISCAL. Nothing more.

ERNEST NICHOLS, being before sworn, recalled by the defense and testified as follows:

FISCAL. I object to the presentation of this witness. There is no reason why he should testify. This is the third time.

COURT. Objection overruled.

Direct examination by counsel for defense:

Q. Do you know this oilcloth which is here?

A. It is the roof of the carromata which was used that night and which was on it that night when I delivered the carromata to the defendant.

Q. How has it come into your possession since that night?

255 A. From the carriage shop where I sent it to be repaired.

Q. Has it been in your possession since then?

A. Yes, sir; since that afternoon until it was brought here by the counsel for the defense.

Q. Is it in the same condition in which it was when you received it?

A. Yes, sir; in the same condition as when it was in my possession.

COUNSEL FOR DEFENSE. Nothing more.

Cross-examination by the FISCAL:

Q. Do you know whether in the carrige shop, where you sent the carromata to be repaired, any change was made in the holes?

A. I do not know.

Q. Did you not make any investigations as to that particular?

A. No; I did not.

FISCAL. Nothing more.

COUNSEL FOR DEFENSE. I offer the roof of the carromata as proof.

COURT. It is admitted without objection.

COURT. On the petition of the fiscal, let the record show that the witness, Mr. Mozart, of the defense, when questioned about the place pointed out by the soldier, Montero, as the place where the revolver was found, pointed in the sketch, Exhibit F, to a place just at the side of the figure 9 in the number 149, which is written in said sketch
256 in the street C. Padilla. That the witness Tatum indicated as the same place that a place which is one inch from the same figure nine in the direction of the land of the church, and that the witness, Major Nevill, indicated in the same sketch as the same place, a distance of one inch from it, or 1 of the figure 149, toward the house marked on the sketch as the residence of Mr. Kempsky.

By request of the counsel for defense, the session is adjourned until to-morrow at nine a. m.

TWELFTH SESSION.

The continuation of the hearing of the pre-ent cause was called at nine a. m., January 5, 1906, there being present the persons named at the beginning, and the following proofs were presented:

JOHN S. KULP, physician and surgeon, U. S. Army, resident of Cebu, married, 29 years of age, being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. What is your profession?

A. Military doctor.

Q. How long have you exercised your profession?

A. Seventeen years.

Q. Have you made a special study of wounds caused by firearms; and, if in the affirmative case, to what extent?

A. Yes, sir; it is one of the themes demanded of me in the examination for a captainey in the army.

257 Q. Is the experience which you have had the result of reading or of your observations, or of both?

A. Of both.

Q. How long have you been in the army as a medical officer?

A. Thirteen years.

Q. Were you present when Dr. Seneca as a witness in this case testified, and did you hear his testimony?

A. Yes, sir; present and heard his testimony.

Q. Did you hear the description which he gave of the wounds which he found on the body of the dead policeman?

A. Yes, sir; I heard it.

Q. What, in your opinion, would be the effects of a wound of such a character?

A. It would not be mortal for some time.

Q. Dr. Seneca spoke of convulsions resulting from a shot. Can you state what convulsions are and what effect they produce on the wounded person, similarly to the one which was described here?

A. There would probably be no convulsions.

Q. What would be the effect of a wound like the one described, made by a shot from a Springfield carbine at the distance of three steps?

A. At that distance there would be a clean wound, with great injury to the internal organs.

Q. Can you state on what you base your opinion?

A. Because at three steps the ball has practically the greatest velocity which it has on leaving the barrel, and what is called explosive action occurs at that distance. The texture of the body at that distance has not sufficient strength to stop the ball.

Q. What would the effect of a ball, under the same condi-
258 tions, be fired against a rib at the distance of three paces?

A. The rib would offer practically no resistance.

Q. Why would it offer no resistance?

A. Because in their outer part the ribs are so soft that they can be fractured with a penknife.

Q. Did you see the body of the deceased?

A. Yes, sir; I saw it.

Q. State what you observed.

A. It would be better for me to explain the circumstances under which I saw the corpse.

Q. What, when, and under what circumstances did you see the corpse, and by whose invitation?

A. Between 9 and 10 o'clock December 1st, at the townhall, by invitation of Dr. Forns. The corpse, as they told me, had two wounds, one in the inferior costal region, and the other on the left side, a little lower down. [Witness points to the places on his body.]

Q. In what position would the arm be when the shot was fired?

A. The arm would cover the wound.

Q. Did you inspect the corpse to see whether there were any burns produced by powder?

A. If I saw signs of powder on the corpse and the clothes?

Q. Yes; state what you found.

A. There were no signs of powder burns.

Q. What is the descending colon which Dr. Seneca refers to and what is the result of perforating it?

A. It is a large portion of the large intestine of the left side which crosses the abdomen, and perforating it never causes death, except after some days.

259 Q. Could such a wound as has been described be caused by a Springfield carbine at the distance of three steps?

A. It could not be. It would not be possible.

Q. Is it possible, that by reason of that wound, as it was described by Dr. Seneca, the wounded person would be subjected to violent convulsions or stupor, causing his death instantaneously?

A. It is impossible for that to occur.

Q. According to your experience with wounds, and what you heard Dr. Seneca say with respect to the policeman's wounds, and in accordance with your best judgment as a surgeon, by what, or in your opinion what was that wound caused by?

A. By a .45 revolver at the distance of ten paces.

Q. Now explain to the court why you say that the wound was not produced by a Springfield carbine, .45 caliber, and why it was produced by a revolver.

A. I have said the distance of ten paces, because .45 revolver cartridges are loaded with black powder and at the distance of ten or eleven feet produce signs of powder on the objects touched; the ball breaking the skin and the rib, glancing off at right angle, turned outside by the rib. Afterward it intersects the wall of the abdomen, its characteristic being that of a projectile which leaves at a lesser velocity. There does not exist any proof of explosive action whatever in the body, according to the description give' by Dr. Seneca, and explosive action is very marked in carbine balls at that distance, but which does not occur with a revolver.

Q. What is the difference between the initial velocity of a bullet from a 45 gun and from a 45 carbine?

A. The velocity of a carbine ball is approximately double the velocity of a revolver ball.

260 Q. At the distance of three paces is the velocity practically the same as the initial velocity?

A. Yes, sir.

Q. Have you ever practiced any experiments in order to verify your opinions as to the effect of a Springfield carbine ball?

A. Yes, sir.

Q. State to the court where you made those experiments and the results of same.

A. I have taken cans full of pre-serves—that is to say, part liquid and part solid—and have fired at them fifteen and twenty feet with a Springfield carbine. The cans are now in a condition in which the explosive effects of the ball can be well observed, and I have the data here.

Q. What is the effect, with respect to the explosive action under those circumstances?

A. The explosive action is clearly marked.

Q. Does a can of preserves give the same results, with respect to the effects shown, as the human body?

A. Approximately.

Q. Give the data which you have.

A. [The witness shows two cans, the size of fruit cans.] A shot was fired at these cans at the distance of fifteen feet. This is the orifice of entrance [pointing on the can] and this is the orifice of

exit [pointing to the same can]. The explosive action is shown, especially on this part which has been lifted and doubled [pointing to the rim of solder on the can]. This other [pointing to the other can] was doubled at twenty feet [the witness marks the orifices of entrance and exit]. The explosive action is very clear.

Q. Did you make any other experiments?

261 A. I tried to make some experiments on deviation to see if it was possible for a carbine ball to rebound from a rib. I took two wooden boxes, each ⅔ inch in thickness, which have a resistance equal to that, or perhaps greater than that, of a rib. I fired at one of the sides at an angle—that is to say, downward—at a distance of three paces, and the orifice of entrance, as well as the orifice of exit which the shot formed from the carbine produced, were in the same line, showing in this manner that there could not be any diviation of the ball.

Q. Did you make any other experiments?

A. I made experiments with a goat, hanging it by the rear parts, and placing it in that manner in a position similar to a person standing. A person, under my direction, fired at the goat at the distance of three paces, hitting it in exactly the same spot where the corpse had been struck. The animal shrieked strongly when the shot struck it and made violent movements, but did not give any signs of dying within an ordinary space of time, and in order to prevent its suffering I order it to be killed. The orifices of entrance and exit appeared here [the witness exhibits two pieces of skin, apparently from a goat, in each of which there is an orifice]. The skin shows powder stains. In the entrance orifice there is a considerable hemorrhage or coagulation, and it has produced great injury and made a large wound in the stomach. It shows another wound in an organ which does not exist in the human body, as the goat is a ruminating animal. From the exit orifice blood flowed at each inspiration of the animal, which was shrieking. There was also a large amount of blood above the liver. The wound was in a straight line.

Q. Did you measure the wounds?

262 A. Yes, sir; the entrance of the wound was thirteen millimeters and the exit fourteen and one-half.

Q. Can a .45 caliber ball from a carbine enter a wound of 11 millimeters?

A. It is possible, but not probable.

Q. Would a Springfield ball fired at three paces make an entrance orifice larger than ten millimeters?

A. It is possible, but not probable.

COUNSEL FOR DEFENSE. I offer as proof the cans which have been identified by the witness and the two pieces of goatskin.

FISCAL. I object to the proof as improper, because the effects on a human body are not the same as on a can.

COURT. The court reserves the decision as to the admission of these exhibits.

COUNSEL FOR DEFENSE. Nothing more.

Cross-examination by the FISCAL:

Q. With respect to the effects of a ball from whatever kind of firearms, is it possible to give an absolute and positive conclusion in the science of medicine?

A. In a certain manner, within certain limits, positive statements can be made.

Q. What do you mean by positive; that it could not be of any other manner except an absolute manner?

A. With the same certainty with which one can affirm with respect to the human body.

Q. But it is always rather probable than sure, since the word "sure" applies to the human body as the same value as probable in general terms.

263 A. Yes, sir.

Q. At the distance of three paces is it possible that a Springfield rifle will produce the wound described here by Dr. Seneca?

A. With a carbine and cartridges in the ordinary condition it would be impossible. If the cartridge lacks some of its ordinary conditions it would be possible.

Q. What would be the effect of a .45 caliber rifle ball at the distance marked in the road if loaded with a .45 caliber revolver ball?

A. I do not know whether that is possible or not, but supposing that it were possible, the effects of the powder would be different in the carbine than in the revolver, because the gun barrel being longer it would have more effect than if it were fired from a revolver, but it would not have the force of a carbine cartridge.

Q. In such case what would be the entrance orifice?

A. In my judgment, it would probably be a millimeter less than the diameter of the ball.

Q. So that the effects of the ball on the human body do not necessarily mean that the orifice of entrance would be larger than the part of the ball, but might be smaller and might even be larger?

A. It might be somewhat smaller or much larger, as is shown by these cans.

Q. You said that the effects of the wound on the descending colon would not necessarily be mortal, but the effects of that wound would always be serious?

A. I have not seen many cases, but I believe that it is impossible for death to result before the infection of the wound commences.

264 Q. What I ask is whether a wound in the descending colon is always necessarily mortal.

A. It is necessarily mortal unless it be attended to.

Q. Can a person wounded in the descending colon be cured?

A. Yes, sir; easily, by an operation. It is the best part of the intestines to operate on.

Q. From what do you believe that that man, whom you saw, died?

A. From a wound caused by a ball.

Q. I am not asking you a priori but a posteriari; state whether it is true that the death of that man was necessarily due to that shot which struck him; so if he had not received that wound he would not have died.

A. It may be he had other wounds, because I did not see or inspect the corpse to ascertain if there were any other wounds.

Q. Supposing that there were no other wounds, and supposing that he had no other wound, is it true that under those conditions he would die?

A. Yes, sir; I believe so.

Q. What you have stated with respect to the effects of the Springfield .45 ball at three paces distance relative to the explosive action is only a theory; its effects are only probable?

A. It is the best that I know from my experience with wounds and from what I have read in works and which can be proven by these books. Men with more serious wounds than the one now in question have lived and have come to me to be cured.

Q. I do not refer to that; I refer to the explosive effects of the ball.

A. They are based on personal observation of wounds.

265 Q. Do you dare to assert that in no case can a shot be fired without the explosive effect existing, and that in no case a Springfield .45 ball would fail to have the explosive effects at three paces distance?

A. It certainly can have explosive action; at three paces distance a ball will always have explosive action.

Q. Is it possible that there might be a case in which there was no explosive action? I do not mean to say that there is none, but whether there might be a case in which such effect would not exist.

COUNSEL FOR DEFENSE. I ask that the questions as to wounds be limited to the present case.

COURT. Motion is overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. If a wound is carefully examined the explosive effects must appear.

Q. Did you examine the interior wounds?

A. No, sir.

Q. Is it true that the explosive effects might be apparent inside but not outside?

A. Yes, it is possible; but I refer to the wound as it was described by Dr. Seneca.

Q. When the effects of the explosion are not very noticeable is it not true that they might remain unnoticed by a doctor of little skill in things of this kind?

A. Very probable.

Q. With respect to the deviation which has been spoken of of the ball, because of deflection from the rib, is it physically impossible for that to occur or is it only probable that what is said to have occurred did not occur?

266 A. It is impossible for a deviation of this kind to occur with a Springfield carbine, and it is very difficult that a doctor should be mistaken as to the deviation of the ball. It is very difficult for a doctor to make a mistake in such a matter.

Q. But what I am asking you is, whether what the doctor said is an absolute impossibility which can never happen, or whether it is only a theory.

A. It is impossible for a .45 carbine ball to turn aside as Dr. Seneca says.

Q. Might not the cartridge have less powder than the ordinary amount?

A. In case the cartridge had less powder the wound described by Dr. Seneca might be produced. It is not only possible, but probable.

Q. With respect to a ball entering the human body, is it not true that up to the present the doctors have not laid down the effects of such a ball?

A. Within certain limits the laws which govern these facts are well known; as with holes which are made in wood.

Q. And do you believe that the holes produced in wood are not different from those made in the human body?

A. I ought to state, as an illustration, that when wounds were examined as this wound was there is no reason for a difference of opinion.

Q. Have you read the November North American Review, in which the most notable surgeons of Japan, one of those who accompanied Admiral Togo, says that it is impossible to determine the effects of balls according to observations in the Japan-Russian war?

A. No, sir.

267 Q. Supposing that at the distance of ten or twenty meters I were to be struck by a shot standing with my arm raised, is it not possible that the ball passed through the arm from right to left, through the skin and come out behind?

A. Yes, sir: it is true. I have seen nine wounds from one single ball, but in these cases the greater part of uncertain elements are eliminated.

Q. What do you call elements of uncertainty?

A. I can not state exactly. I do not recall at present the elements of uncertainty.

Q. But do you mean to say by that that your theories which you have stated are very probable, but that they do not exclude the possibility that there are others than those you have stated?

A. There are exceptions to all rules and there are also in medicine and surgery, but I can only state that like causes produce like effects.

Q. Did you make the experiments with the cans, the wooden boxes, and the goat to strengthen your point of view in this cause?

A. No, sir.

Q. Are you sure that your experiments were well made?

A. I am sure that this is the effect that was produced.

Q. Why did you make those experiments?

A. To give the information to the court.

Q. Are you sure that if we could put these cans back in their original condition that the result would be the same at the same distance and under the same conditions as when you fired at them?

A. If the composition of these cans is uniform, as is human skin.

Q. I ask you whether if they could be returned to their
268 original condition and were to fire at them with the same gun, would the result be the same?

A. The result would be practically the same.

Q. Is it not true that it is not possible for them to be the same; that they would be identical, but not the same?

A. The result would be that the cans would be rendered useless the same as the human body, but under the same conditions the same effects must be produced.

Q. Is it not true that the experiments made by you with balls have never been made in similar cases?

A. Yes, sir; but it is also not true that all bodies are equal.

Q. Then, in order to ascertain the effects of a ball on every body it would be necessary to know the condition of said body and its nature, and it would be impossible to give rules for knowing the nature of the body?

A. Yes, sir; it is true.

Q. With respect to the deviation of the ball, is it not true that the only trial made by you was the one with reference to the goat and the box and the cans?

A. I made some others with respect to penetration in pieces of wood, but they were made to show penetration and had nothing to do with deviation.

Q. No others than those?

A. No others with respect to deviation; I did not make any others.

Q. And the reasons which you allege as to deviation are based upon the facts which you have affirmed?

A. On my experience and from the reading I have done.

Q. Is it not true that the box which you used had much less resistance than a human rib, because the rib has a certain
269 amount of elasticity from the manner in which it is located and the wood because of its being fixed?

A. I do not believe that it would be the same. It would not have absolutely the same resistance.

Q. But is not a rib apparently more resistant, as it has a certain amount of elasticity and is placed in a movable manner, than wood which is placed in a fixed manner?

A. I believe that there would be very little difference between the rib and the box. It is a question of opinion. There may be difference of opinion.

Q. You said that the wound of the dead policeman must have been covered by his arm; that he would be if he was in a fixed position.

A. Yes, sir; only in such case.

Q. Is it not true that in case he were walking this wound might be produced?

A. In case he were walking he would probably have a wound in the arm, and in case he was holding his revolver with his right arm the wound here described would probably have been received.

Q. But is it possible to have received it while walking?

A. Very likely.

Q. I wish you would state positively whether you found powder signs on the body and the clothing.

A. I did not examine them carefully.

Q. Is it not possible for that man to have died instantly under the circumstances described?

A. It is not possible with that wound; the death in that case might be due to a cardiacal affection of the heart, but not to the wound.

270 Q. If you were to find data beyond a doubt that a man was walking and received a shot and that fell apparently dead, lifeless, and that later it was discovered that this man was dead, that the wound received by him was exactly the same as the one described here, to what would you attribute the death of that man?

A. I believe that that is impossible; I can not conceive of such a case. Apoplexy is possible in that case.

Q. Directly or indirectly due to the shot?

A. It has nothing to do with this case. It might be heart disease or something else, as there are people who fall dead from it.

Q. But the determining cause would be the shot received?

A. The hemorr'age from the wound would be conducive to apoplexy.

Q. What do you mean to say was impossible—merely the instant death of a man under the conditions described in the records, or that it is also impossible that he fall to the ground senseless?

A. He would probably fall senseless.

COURT. What was there inside those cans?

A. Tomatoes.

Q. Can you state with certainty that tomatoes represent the texture of the human body with respect to resistance?

A. Not in respect to resistance.

Q. What represents the rib?

A. The can represents the rib.

Q. But here there is no skin.

A. The skin represents the wall of the abdomen. It is only approximately the reality, nothing more.

271 Q. Is it not true that the exceptional cases in surgery have been discovered by reason of phenomena which appear to have been impossible up to the time of their discovery, and that up to that time they have been considered as impossible?

A. Yes, sir; that is true.

FISCAL. Nothing more.

CHARLES W. FARR; lieut. surgeon, U. S. Army; 29 years of age; resident of Cebu; married; being duly sworn, testified as follows:

Direct examination by counsel for defense:

Q. How long have you exercised your profession of physician and surgeon?

A. Eight and one-half years.

Q. What experience have you had in questions of firearms and what special study have you made with respect to them with relation to wounds?

A. I have been surgeon in a hospital for a year, treating wounds. During that time I saw ten or twelve cases of wounds from firearms, and in the seven years I have been in the army I have seen an equal number, and besides that, I have read the books which treat of these matters in detail.

Q. Did you hear the description which Dr. Seneca gave of the wounds of the deceased policeman?

A. Yes, sir; I heard it.

Q. What, in your opinion, would the effects of a .45 Springfield carbine bullet be in the position described by Dr. Seneca?

A. The ball would go directly through the body, causing great destruction in the interior of the abdomen.

Q. Have you examined the body of the deceased policeman?

272 A. No, sir.

Q. Have you ever seen a case similar to the one described by Dr. Seneca?

A. I have seen cases of wounds with entrance orifices similar to that, but all the conditions were not the same as the ones described.

Q. Do you know at what distance the shot was fired in those cases?

A. At fifteen feet.

Q. What were the effects of those wounds? What difference was there between those wounds and the ones in the present case?

A. A portion of the small intestine was destroyed and there were seven orifices in the intestines.

Q. What were the causes of that perforation?

A. They were due to the explosive effect of the ball, and the different wounds in the small intestines were due to the ball itself as it passed through there.

Q. What is the descending colon, and what is the result of perforating it?

A. It is a large intestine which is below on the left-hand side of the rectum, and the effects of perforating it are not apparent until inflammation is caused by the passage of digested material through it.

Q. Is it possible for the wounds described by Dr. Seneca as caused by a .45 Springfield carbine to have been produced by that bullet at the distance of three steps?

A. In my opinion, it can not be.

Q. And a wound such as the one described by Dr. Seneca would probably cause the wounded man to fall without being able to make any movement afterward?

273 A. In my opinion he might fall, but in my judgment he would not remain motionless.

Q. What would you say with relation to the cries that he might make afterward?

A. It is very probable that he would scream afterward.

Q. Were you present at the experiments made by Mr. Kulp?

A. Yes, sir; I was present at all of them.

Q. What part did you take in all those experiments?

A. I fired the carbine.

Q. Did you see the wound made on the goat?

A. Yes, sir; I saw it.

Q. What were its effects with relation to the velocity of the bullets, the movements and other signs made by the wounded animal?

A. The animal was surprised on receiving the shot. On being wounded the animal made movements as if to try to escape, and continued alive for about five minutes until I fired again and killed it.

Q. Were the wounds more serious than the ones described by Dr. Seneca?

A. They were more serious.

COUNSEL FOR DEFENSE. That is all.

Cross-examination by the FISCAL:

Q. In one of your answers you always referred to your opinion. Is it because you believe it is possible to hold another opinion?

A. All that depends on the knowledge of the surgeon. I do not doubt that other opinions may exist. Other doctors
274 might hold different opinions.

Q. Is not this due to the fact that in regard to points about which you have testified that there is nothing absolute in medicine?

A. I believe not; it is not due to that; it depends upon the different degrees of knowledge possessed by the surgeon.

Q. Might doctors of equal knowledge hold different opinions?

A. Yes, sir; it is possible; it is true.

Q. Returning to the present case—the points of view upheld by you are nothing more than probable points. They are not exact?

A. In my opinion there is no doubt.

Q. Is it not true that if a physical law were being dealt with—as, for instance, gravity, by virtue of which every suspended body falls to the center of the earth—that you would not have to give your opinion?

A. No, sir; I would not do it.

Q. You would speak without doubt and without opinion?

A. Yes, sir.

Q. Although it is probable, according to your opinion, that a wound like the one described by Dr. Senenca could not possibly have been received under the circumstances described, if during your practice you were to see with your own eyes that a man had been shot and in spite of that only one wound appeared, would you say that that case was impossible?

A. No, sir; certainly not.

FISCAL. That is all.

COURT. The court admits the two cans presented as proof.

275 NOTE.—The counsel for the defense requests that the clerk of the court be sworn in order that there appear in the records the hour when the complaint was filed against the accused, to show that the complaint in this cause was filed December 1, 1905, at 9.00 a. m.

COURT. The court overrules the motion as irrelevant, as whatever testimony the witness might give would be irrelevant even in case he should testify as indicated by the counsel for the defense.

COUNSEL FOR THE DEFENSE. Note an exception.

The defense rests.

The fiscal stated that before beginning his rebuttal he renews his motion as to the ocular inspection as to the scene of the crime and of the carromata in question which was used by the defendant that night, as testified by various witnesses for the prosecution; and the court then orders that at 4.00 p. m. the ocular inspection requested by the fiscal would be made in the presence of the defendant, his counsel, the fiscal, the stenographer, and the clerk of the court.

COURT. The session is adjourned until 3.30 p. m.

THIRTEENTH SESSION.

At 3.30 p. m., January 5, 1906, the continuation of the present cause was called, and there appearing the defendant, together with his counsel, and the fiscal appearing for the government.

The court then removed to the place on street C. Padilla, to which the testimony of the witness for the prosecution in this cause stated to be the same act of which the defendant was charged. The

276 court was accompanied by the fiscal, the defendant, his counsel, John W. Sleeper, the clerk of the court; the stenographer, and the sheriff, and the above-named persons having met together, the court made an ocular inspection of the carromata which was used by the defendant on the night of record which was in that place.

In view of all the above words and persons above mentioned and of the place where the act with which the defendant was charged occurred and also made an ocular inspection of the houses and objects which were mentioned in the testimony of the witnesses for the prosecution. Further, in the presence of the above-mentioned persons, the fiscal, as a part of the ocular inspection, presented the following proofs and ocular demonstrations.

The fiscal ordered the constabulary men who accompanied the defendant on the night of record to get into the carromata in the same way in which they were when the act occurred, and the witnesses, Ruis, Maglinao, Jimnasi, and Tecson did so.

F. Place yourselves just as you were in the carromata on the night of record just before the shot was fired.

The seat where, according to the witnesses, the defendant was, remained vacant during this inspection, not being occupied by the defendant for the reason that not having presented himself as a witness, the court can not compel him to be a witness in this cause.

The witness Ruiz sat in the driver's seat. The witness Tecson on the left-hand side of the place remaining vacant in the carromata and which was said to be the place where the defendant had
277 sat. The witness Jimnasi was on the right side facing the vacant seat and taking the position which he said he took the night of record, leaning back against the driver's back, jumping out of the carromata in the direction in which he said he had jumped from the side where he was sitting, and towards the horse, passing in front of it. The witness Maglinao sat in front of Tecson and leaned against the driver. The carromata was placed with the horse's head looking toward El Pardo and the rear of the carromata towards Cebu.

COUNSEL FOR DEFENSE. Is this the place where the shot was fired?

RUIS. Yes, sir.

FISCAL (to Maglinao). Show how the policeman was walking just before the shot.

MAGLINAO. The policeman was in this position [the witness places himself on the right-hand side of the carromata, a little behind the driver's seat] and started to run this way [the witness turns half about toward the rear of the carromata toward the left-hand side in an oblique direction], and on arriving here the shot was fired [the witness stops at a place which is to the left and a little behind the carromata next to the fence of the house at the left-hand side of the road].

FISCAL (to Maglinao). Get into the carromata and state the position of the defendant at the moment of firing.

MAGLINAO. The muzzle of the lieutenant's gun was in this position and he struck Jimnasi in this way [the witness occupies the place where it is said the defendant was and places the barrel of the gun about the height of Jimnasi's shoulder and strikes him with the barrel] and afterward the lieutenant turned half about and
278 fired thus [the witness gives half a turn to the left of the seat where he is sitting; putting the gun through the rear window of the carromata, aims in an oblique direction where it is alleged that the deceased was and whose position was occupied by one of the policemen].

FIS. (To policemen, Quiamco and Deabordo.) Show the place in which you were and the direction that you took on running just before the shot and just after the shot.

A. (Policemen.) Before the shot we were here. [They stand parallel with the carromata nearer to the place where the deceased was killed and to the left-hand side.]

Counsel for the defense calls attention to the fact that the place where the vehicle is standing is almost at the side of an alley and that the carromata lamp is almost in front of the post.

POLICEMEN. At the moment the shot sounded we started to run in this direction; first Quiamco and afterwards Deabordo. [Both witnesses run straight toward El Pardo to the south.]

It is caused to appear in the records that Quiamco was in front of the rear of the carromata and that Deabordo was in front of the step and the horse.

FISCAL. I desire that the others place themselves in the manner in which they say that they went to the townhall to the quarters when the seven of them went there.

The four witnesses, Tecson, Ruis, Maglinao, and Grava, appear in a position similar to the one first described. The place where it is said that the defendant sat remains vacant and a policeman stands on the floor of the carromata with one foot almost outside to the right, and the other policeman on the opposite side, half sitting.

279 It is caused to appear in the records that the light which is said to have been taken by order of the defendant, was in the house which stands in the right of the carromata and a little beyond, from the second step of the stairway, the witness Ruis going through the action of getting it as on the night of record.

The above-described ocular inspection and practical demonstrations having been held in the manner described, the fiscal stated that his proofs were concluded and the hearing was suspended until January 6, 1906, at 9 a. m.

FOURTEENTH SESSION.

The continuation of the hearing in the present cause was called on January 6, 1906, at 9 a. m., there being present the persons named at the beginning of this record and the following proofs were presented:

The counsel for the defense presented a motion to the court, stating that he had no objection to the ocular inspection made the day before, but that he did object to the proof presented at said inspection, because this permitted the witnesses for the prosecution to corroborate some of the false testimony that they might have given, thus agreeing among themselves to correct their testimony and compelling the defense to look for new proof; that the rights of the defendant are prejudiced when, besides the simple ocular examination of the place of the affair, other proofs are presented such as the examination of the witnesses. The carromata which was said

280 to have been used by the defendant had been taken to the scene of the inspection previously and the witnesses for the prosecution were already there without the defendant being able to present his witnesses to contradict the statements of the others.

The fiscal opposes the motion as groundless.

The court reserves its decision.

The fiscal being asked by the court to present his rebuttal, asked the court for a period until January 8, 1906, and the counsel for defense having stated that he had no objection, the court suspends the hearing of the cause until Monday, January 8th, 1906, at 9 a. m.

FIFTEENTH SESSION.

The continuation of the hearing in the present cause was called on January 8, 1906, at 9 a. m., there being present the persons named at the beginning of this record, and the following proofs were presented.

Rebuttal on part of the prosecution.

LUCIANO BACAYO, before sworn, was recalled by the prosecution and testified as follows:

Direct examination by the FISCAL:

Q. Did the witness, Agripino Nolasco, meet you before now to give you some shells?

COUNSEL FOR DEFENSE. I object to the question as improper rebuttal and because there is no proof in the case that these shells were delivered to the witness, but that he delivered them to two policemen.

281 COURT. Objection is overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. Yes, sir.

Q. Where, how, and what did he tell you?

COUNSEL FOR DEFENSE. I object to the question as not being the best proof, as being hearsay, and that the statement was made in the absence of the defendant.

FISCAL. I want to prove that Agripino Nolasco did not state the truth, and that he told this witness something distinct from what he stated in court.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. The afternoon of the first day of last month, or the day following the affair, Agripino Nolasco came to my house and delivered to me three shells, one loaded and two unloaded.

Q. What did he tell you?

COUNSEL FOR DEFENSE. I object to the question for the same reasons.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note exception.

A. He told me that the loaded shell and the two empty ones had been found by him at the place where the policeman fell near a pool of blood, and added that the empty one had been found away from that place at a little distance.

COUNSEL FOR DEFENSE. I ask that the testimony of this witness be stricken out, because Nolasco did not testify about what this

282 witness is stating, and because it is improper rebuttal and ought to have been presented in the direct proof.

COURT. The court decides that it should not be excluded as improper rebuttal, as, although the guilt of the accused can not be shown by rebuttal, the circumstances accompanying a fact of the direct proof can be reserved as rebuttal. Objection is overruled.

COUNSEL FOR DEFENSE. Note an exception.

Q. You said that the empty shell was found farther away from the other two. Farther away in which direction; toward El Pardo or toward Cebu?

COUNSEL FOR DEFENSE. I object to this question as improper rebuttal, incompetent, immaterial, and because no base has been laid for impeaching the witness, Nolasco.

COURT. Objection is overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. Toward Cebu.

Q. Are these the cartridges?

A. Yes, sir; they are the same.

(The fiscal offers as proof two empty shells and a loaded one, identified by the witness.)

COUNSEL FOR THE DEFENSE. I object to this proof as impertinent and because it has not been shown that they are the same shells which Nolasco got from the place of the occurrence.

COURT. The proof is admitted.

COUNSEL FOR DEFENSE. Note an exception.

Q. Was a shoulder strap delivered to you also?

283 COUNSEL FOR DEFENSE. I object to this question as improper rebuttal and only proper for direct proof.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note exception.

A. Agripino did not deliver the shoulder strap to me, but a policeman, before six a. m., one Basila Tudloss. That morning was December 1st, and on delivering it to me he said that it had been found.

COUNSEL FOR DEFENSE. I ask that the hearsay be eliminated.

COURT. Objection sustained.

Q. Has any other shoulder strap been delivered to you at any other time in relation to this case, or has only one shoulder strap been delivered to you?

COUNSEL FOR DEFENSE. Object to that question as immaterial.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note exception.

A. Only one shoulder strap was delivered to me.

Q. Was it this shoulder strap?

A. This is the one which was delivered to me.

FISCAL. The shoulder strap is offered as proof.

COUNSEL FOR DEFENSE. Object because there is no proof that this is the shoulder strap that the witness wore that night, nor has it been proven that it was lost in the place of record by the accused.

284 COURT. In view of the fact that there are many regulations and changes in the uniforms, the court will not officially recognize this as a constabulary shoulder strap. Objection sustained.

FISCAL. That is all.

COURT. Cross-examination.

COUNSEL FOR DEFENSE. No cross-examination.

EMETERIO MONTERO, being before sworn, was recalled to testify on part of the prosecution and testified as follows:

COUNSEL FOR DEFENSE. I object to the presentation of this witness now as the defense has rested and because it is improper rebuttal, he being one of the witnesses named in the fiscal list, and because he was not presented by the prosecution; he was called by the defense and the prosecution had a right to cross-examine him to ascertain whatever was desired.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note exception.

Direct examination by the FISCAL:

When you found the revolver did you put any mark on the place where you found it?

COUNSEL FOR DEFENSE. I object to this as improper rebuttal and as a matter for cross-examination.

COURT. Objection sustained.

FISCAL. Note an exception.

285 Q. When did you find that revolver, before or after the corpse was loaded into the carromata?

COUNSEL FOR DEFENSE. Same objection.

COURT. Objection sustained.

FISCAL. Note an exception.

URBANO MAGLINAO, being duly sworn, testified as follows:

Direct examination by the FISCAL:

COUNSEL FOR DEFENSE. I object to this witness being presented because he has already been examined and cross-examined and according to the rules of testimony he can not again be examined.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note an exception.

FISCAL. I ask that the part of the testimony of this witness be read which refers to the manner in which the witness, on being cross-examined by the defense, showed the court how the defendant had the gun in his hand when he fired the first shot in order to clear up the record on this point.

COUNSEL FOR DEFENSE. I object to this as improper rebuttal.

COURT. Objection sustained.

COUNSEL FOR DEFENSE. Note an exception.

Q. How was the movable part of the oilcloth on the carromata that night [showing Exhibit A and pointing to the oilcloth at both sides of the carromata]?

286 COUNSEL FOR DEFENSE. I object to this as improper rebuttal.

FISCAL. I ask this question because in the proofs of the defense it was established in a very indirect way that the oilcloth was in the form shown in the exhibit. I desire to clear up that point.

COURT. Objection is sustained.

FISCAL. Note an exception, because it was desired to show by this witness that the oilcloth of the carromata was rolled up, contrary to the statements of the witness, Mozart.

COURT. The fiscal asks that there appear in the records the descriptions of the physical movements made by this witness in his answers to the cross-examination and referring to the manner in which the defendant was holding the gun in his hands on making the hole in the roof of the carromata.

COURT. Court overrules the motion.

FISCAL. Note an exception because the manner in which it is described in the records does not show absolutely that which the prosecution desires to establish, which is the manner in which the hole was made in the roof of the carromata with the barrel of the gun.

COURT. The court causes it to appear in the records that when this witness was cross-examined by the counsel for the defense in regard to the fact referred to by the fiscal; that is, the manner in which the defendant was holding the gun when he made the hole in the roof of the carromata, that he made physical demonstrations, but they were not set down in the record by the stenographer in a minute description.

FISCAL. That is all.

287 JESUS S. MELLADO states his name as Jesus Sanchez Mellado; 46 years of age; resident of Cebu; physician and surgeon; being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. How many years have you been a physician and surgeon?

A. Twenty-eight years.

Q. Have you had an opportunity to read in the records of this cause the description given by Dr. Seneca of the wounds of the deceased?

A. Yes, sir; I have read it.

Q. According to Dr. Seneca's description of the wounds, in your judgment as a physician, were they or were they not necessarily mortal?

COUNSEL FOR DEFENSE. I object to this because no base has been shown to prove that he is an expert witness and because on saying that he has read the testimony it is not possible to know whether it was correct.

COURT. Did you read the typewritten record?

A. Yes, sir.

CT. Written by whom?

A. I can not state.

COURT. He may answer.

COUNSEL FOR DEFENSE. I object to this question as improper rebuttal.

COURT. Objection is overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. From what I have read in the report and from the ex-
288 planations which Dr. Seneca has made to me they were necessarily mortal.

COURT. The answer is stricken out.

WITNESS. As described by Dr. Seneca, they were necessarily mortal.

FISCAL. That is all.

Cross-examination by counsel for the defense:

Q. What do you mean by saying necessarily mortal; that he necessarily had to die in case he did not have medical attendance, and that he had to die immediately after the bullet struck him?

A. I believe that he would have died immediately.

Q. What organs did the ball strike to cause death; following the course of the abdomen, to cause death?

A. In my judgment, the liver, the stomach, and the spleen and the diaphragm were intersected.

Q. Did you read in Dr. Seneca's testimony that the liver was intersected?

A. No, sir; I did not read it. I say so from the direction of the wound.

Q. Did you read that the spleen was intersected?

A. No, sir; in Dr. Seneca's testimony the track of the wound is omitted from the entrance orifice to the exit. He says nothing more than that the descending colon was intersected.

Q. Then you' opinion in this cause is not based on the things which Dr. Seneca said, nor on what you read in his testimony, but on the things which he did not state?

289 A. In the testimony of Dr. Seneca nothing is said of the path from the entrance orifice, and, therefore, nothing is said about where the ball passed. Nothing is spoken of except the descending colon, and he does not give a list of the organs which the ball necessarily had to intersect. The ball did not pass through hollow places. The organs are in juxtaposition with each other, and undoubtedly the path had to intersect those organs.

COUNSEL FOR DEFENSE. That is all.

Redirect examination by the FISCAL:

Q. So that your opinion, now stated, is based on the track described by Dr. Seneca?

COUNSEL FOR DEFENSE. I object to the question as improper cross-examination.

COURT. Objection overruled.

A. I based my statement on the track described by Dr. Seneca and on the topography of the place where the ball passed.

FISCAL. That is all.

BASILIO TUDLA; 28 years of age; municipal policeman; resident of Cebu; being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. Do you know Agripino Nolasco?

290 A. Yes, sir.

Q. State whether or not he delivered a shoulder strap to you December 1st of last year.

COUNSEL FOR DEFENSE. I object to the question as not being the best proof.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note exception.

A. The day of the affair the policeman, Nolasco, delivered me a shoulder strap.

Q. What do you mean to say—in the morning?

A. In the morning.

Q. The forenoon following the early morning when the act occurred?

A. Yes, sir.

Q. To whom did you deliver the shoulder strap?

A. To the president.

Q. What is his name?

A. Mr. Luciano Bacayo.

Q. Is this the same shoulder strap?

A. Yes, sir.

FISCAL. I offer the shoulder strap as proof.

COUNSEL FOR DEFENSE. I object because it has not been shown that it belongs to the accused, nor that it is a constabulary shoulder strap.

FISCAL. Is this a constabulary shoulder strap?

COUNSEL FOR DEFENSE. I object as not being the best proof.

291 COURT. Objection sustained.

FISCAL. That is all.

COUNSEL FOR DEFENSE. No cross-examination.

URGANO MAGLINAO, recalled, testified as follows:

Direct examination by the FISCAL:

Q. Is this a constabulary shoulder strap?

COUNSEL FOR DEFENSE. I object because this witness has already been examined three times, and because it is not the best proof and is improper rebuttal, and because it has not been shown that the defendant lost a shoulder strap that night, and because it impeaches the testimony of the witness Nolasco.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. Yes, sir; it is a shoulder strap of a lieutenant of the constabulary.

FISCAL. That is all.

Cross-examination by the counsel for the defense:

Q. How long have you been in the constabulary?

A. Nine months.

Q. Have the different constabulary officers different shoulder straps?

A. The only one who has another kind of shoulder strap is the major.

Q. Do you know what kind of a shoulder strap the chief
292 inspector of constabular has?

A. I have not seen his shoulder strap.

Q. What kind of a shoulder strap does the captain wear?

A. I do not know what kind of shoulder straps the captain has. I only know what the lieutenant and major have.

Q. How many grades of lieutenant are there?

A. First and second lieutenant.

Q. What kind of a shoulder strap has the first lieutenant?

A. They say it has four bars.

Q. But do you not know?

A. I do not know positively what kind of shoulder straps the first lieutenant has. I believe it has four bars.

Q. What insignia has the second lieutenant?

A. The second lieutenant has three shoulder straps.

Q. What is the defendant's grade?

A. Lieutenant of constabulary; I do not know what grade.

Q. Do you know whether he was a third lieutenant?

A. No, sir.

Q. Is it not a fact that he was a subinspector?

A. I do not know, because I have not been in the company very long.

COUNSEL FOR DEFENSE. That is all. I object to the admission of this proof because it has not been shown in any manner that this shoulder strap belonged to the defendant.

COURT. The court admits the shoulder strap offered as proof inasmuch as it tends to impeach the testimony of Agripino Nolasco, a witness for the defense, in regard to the delivery of a constabulary officer's shoulder strap.

293 COUNSEL FOR DEFENSE. Note an exception.

COURT. Session adjourned until 3 p. m.

SIXTEENTH SESSION.

The continuation of the hearing in the present cause was called at 3 p. m., January 8, 1906, there being present the persons named at the beginning of this record, and the following proofs were presented:

JAMES E. JOHNSON, 25 years of age, resident of Cebu, native of the United States, first lieutenant of constabulary, stationed in Cebu, being duly sworn, testified as follows:

Direct examination by the FISCAL:

Q. Have you had any experience with firearms?

A. Yes, sir.

Q. From your experience can you state anything with respect to the effects of bullets?

A. I can not state anything from my experience; I can not state the effects of bullets.

Q. I am asking you if the effects are very dissimilar?

A. Yes, sir.

COUNSEL FOR DEFENSE. I object because it has not been proven that the witness is an expert.

COURT. State what experience you have had with firearms.

A. Three years' service in the Regular Army and three years in the constabulary.

294 COURT. Have you observed during your experience any effects of bullets?

A. Yes, sir; I have had some opportunity to see the effects of bullets.

COURT. State exactly what experience you have had with firearms.

A. I have seen many men killed with firearms in the Philippine Islands, and I have observed many cases of their effects in the Regular Army.

COUNSEL FOR DEFENSE. I desire to ask the witness some questions.

Q. Did you make special examination of the wounds in the cases you have cited?

A. In some cases I did.

Q. Are you a surgeon or a physician?

A. No, sir.

Q. Do you know the names of the different parts of the human body?

A. No, sir.

Q. For what reason did you make a special study of the effects of bullets on the human body?

A. Because of the interest I had in the matter.

Q. Have you made an autopsy?

A. No, sir; I am not a doctor.

COUNSEL FOR DEFENSE. I believe that the witness is not an expert.

295 COURT. The objection to the testimony of the witness is directed rather against the value of his testimony than against his competency. The court admits the witness as an expert to testify concerning the above-mentioned effects.

FISCAL. Has a .45 caliber Springfield rifle bullet necessarily an explosive effect?

COUNSEL FOR DEFENSE. I object to this question because the witness has said that he does not know the organs of the body and because the question is vague. The witness can not testify about the explosive action and because this question is a matter of direct proof and not of rebuttal.

COURT. Objection overruled.

COUNSEL FOR DEFENSE. Note an exception.

A. In my experience, not always.

Q. Do you know the defendant?

A. Yes, sir.

Q. On November 30th last what was his position?

A. I did not then know him.

Q. Do you know what was the last position which he held?

COUNSEL FOR DEFENSE. I object to the question as not being the best proof.

COURT. Objection sustained.

Q. Since when have you known him?

A. Only two and one-half weeks.

Q. Can you tell me what this shoulder strap is?

COUNSEL FOR DEFENSE. I object to the question as irrelevant and immaterial.

COURT. Objection is overruled.

296 COUNSEL FOR DEFENSE. Note an exception.

A. It is of a first lieutenant of Philippines constabulary.

Q. Showing you these two empty shells, state whether they are from a rifle or a revolver.

A. They are from a rifle.

FISCAL. That is all.

Cross-examination by counsel for defense:

Q. Did you say that the Springfield carbine bullet never has an explosive effect in the human body?

A. No, sir; I did not say that.

Q. Did you see the wounds on the body of the deceased?

A. No, sir.

Q. Can you say, without any doubt, that a Springfield ball will or will not have an explosive effect, without having seen the wound nor without having examined the body?

FISCAL. I object to the question as improper cross-examination.

COURT. Objection overruled.

FISCAL. Note an exception.

A. No, sir.

COUNSEL FOR DEFENSE. Nothing more.

ANDRES BARROMEO, resident of Cebu; married; 25 years of age; assistant fiscal of province of Cebu and East Negros; being duly sworn, testified as follows:

297 Direct examination by the FISCAL:

Q. At what time on November 30th or December 1st did you examine the defendant?

A. This defendant came to the office of the fiscal; he was not under arrest yet.

Q. Did you ask him any questions about the act?

A. Yes, sir.

COUNSEL FOR DEFENSE. I object to the presentation of this proof, because General Order 58 prohibits the use of testimony against the defendant.

FISCAL. It is not to show any confession, but to prove that he was a lieutenant of constabulary.

COUNSEL FOR DEFENSE. I object to the question as immaterial and because it has nothing to do with the cause and as improper rebuttal in all respects.

COURT. Objection is sustained. This would be direct proof.

FISCAL. That is all.

The fiscal presents a motion, asking that Mr. Nicolas be ordered to bring his carromata, which was used that night, to court, in order to demonstrate to the court in what position the persons sat in it.

COUNSEL FOR DEFENSE. I object to this motion, because the fiscal has presented proof as to the carromata, and the defense has not presented any contrary proof, and no proof can now be presented which tends to corroborate the direct proof.

Counsel for defense admits the fact that the carromata could
298 carry seven men, and the court denies the motion of the fiscal.

The fiscal excepts, because he wanted to show the form in which the witnesses who testified in this cause were in the carromata; the manner in which the defendant committed the act inside the same carromata.

The fiscal closes his rebuttal.

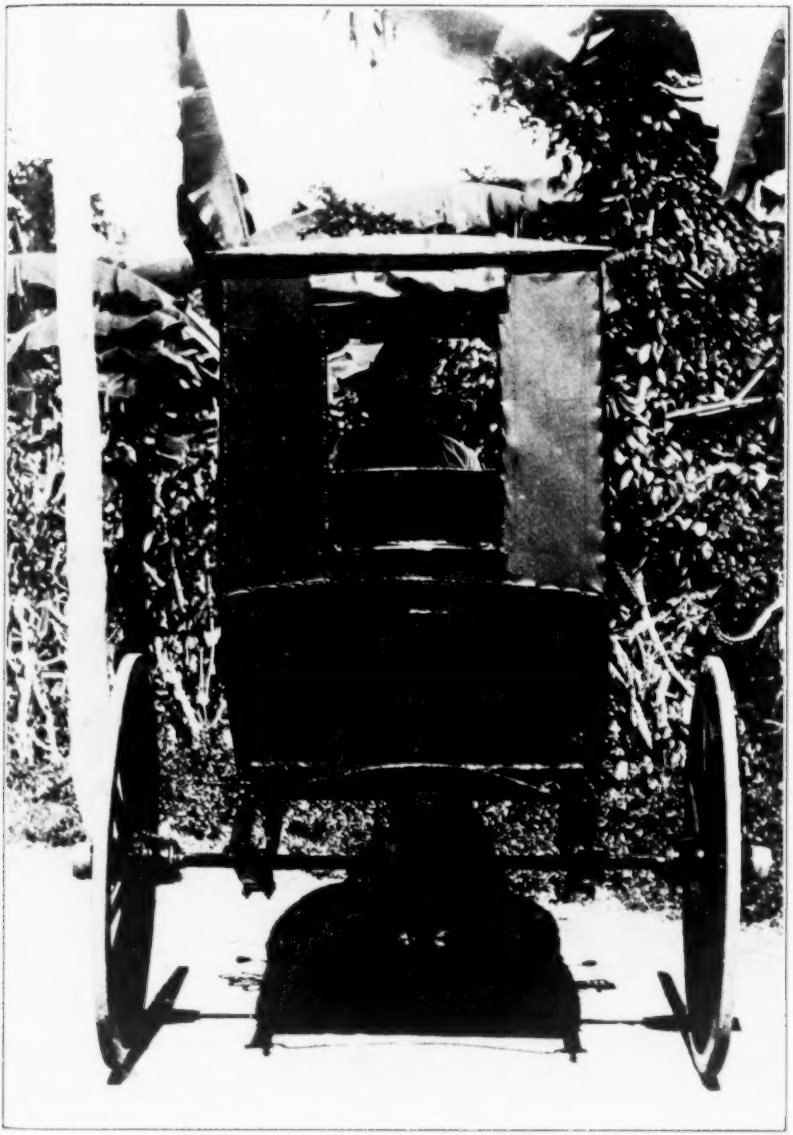
The counsel for defense declines to present rebuttal for the defense.

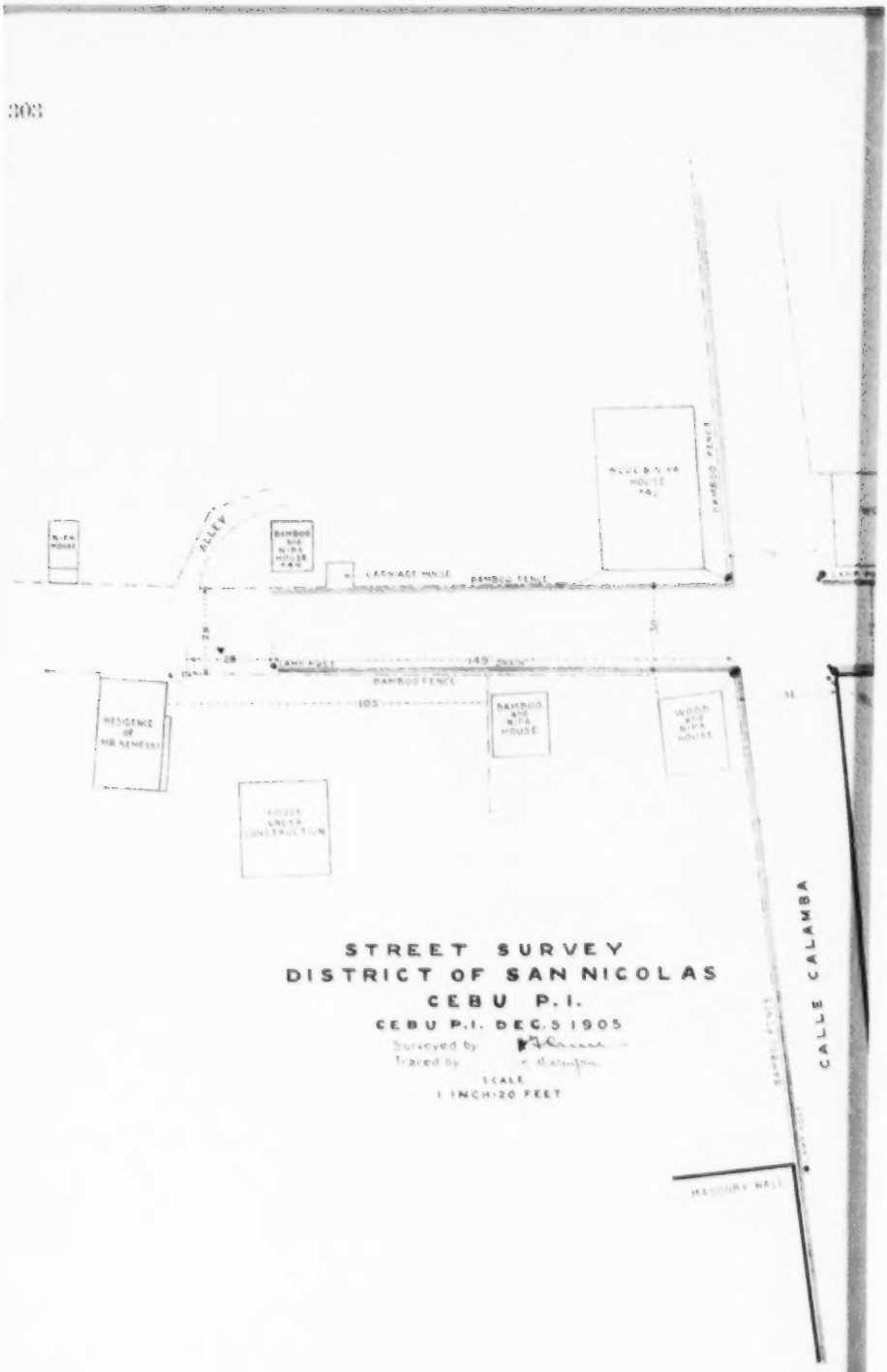
By agreement both parties will meet at 9 a. m. the 16th day of January, 1906, for the arguments in the case and the court suspends the hearing until said date.

I certify that each and every one of the preceding statements which form the present record are an exact copy of my stenographic notes taken on the days and at the sessions to which they refer.

Cebu, Cebu, P. I., January 10, 1906.

(Sgd.) VICTORIANO ONRUBIA,
Official Stenographer, 11 Judicial District.





STREET SURVEY
DISTRICT OF SAN NICOLAS
CEBU P.I.

CEBU P.I. DEC. 5 1905

Surveyed by
Traced by

SCALE
1 INCH=20 FEET

Extent N. of the Cofradia
WOOD & NIPA HOUSE
CALLE C PADILLA
MASONRY WALL
CHURCH PROPERTY
VACANT
CALLE CALAMBA

304 EXHIBIT G OF THE DEFENSE.

The plazas, streets, alleys, and bridges.

PLAZAS.

Old name.	New name.
Marfa Cristina	Libertad.
Gral. Loño	Rizal.
Alcolea	Washington.
S. Nicolas	General Luna.
Gen'l Zappino	Hamabar.

STREETS.

Serrano and Enrile	Martires.
Gravina	Lapu-lapu.
M. Cristina and Sevilla	P. Burgos.
Marfa Cristina from the Cathedral to Manso	Mabini.
Alfonso XIII	North America.
N. o Victoria	F. Gonz les.
Blasco de Garay	Plaridel.
Cadiz	Legarta.
Claveria	Balintawak.
Lealsa	Nellas Carmelo.
Aurora	Noli-me-tangere.
Madrid	Luzon.
Zaragoza	P. nganiban.
Corcuera	Sikatuna.
Barcelona	P. Zamora.
McClernand	Comercio.
Carlos I	Morga.
Alcarazo	Lincoln.
S. Lucar de Barrameda	Anacleto del Rosario.
Magallanes and Infanta	Magallanes to the San Nicolas bridge.
Felipe II	Juan Luna.
Urdaneta	Urdaneta.
Bailen	P. Gomez.
Colon and Teatro	Colon.
Vasco de Gama	Espa ña.
305 Pizarro	Zulueta.
Hernan Cortes	Lopez Jaena.
Manso	Andrés Bonifacio.
El Pardo	C. Padilla.
Novaliches	Tupas.
Weyler	3d of April.
Rosalia	Carlock.
Cataluña	Panay.
Aragon	Figueroa.
Guadalupe	Kalamba.
Infante	Lakandula.
Nav rra	Garfield.
Bulho	Spoliarium.
C rbon	Kawit.
Seb Elcano	La Solidaridad.
Pilar	Filibusterismo.
Malaga	Luis Flores.
P. Arsenio	P. Ezpeleta.
Granada	Torres Bugallon.
Mindanao	B. Aranas.

BRIDGES.

Taboada	Concordia.
Rizal	Evangelista.
Tin go	Soliman.
2nd Tinago	Cervero.
Marfa Cristina	Biak-na-bato.
China	Revolución.

ALLEYS.

Old name.	New name.
Parian	Sudlon.
Teatro	Polaez.
Hernan Cortes y Manso	Ballesteros.
Panting	Binakayan.
Theater and new street	Sancianke.
Corcuera and Alfonso XIII	Imus.
Licod	J. C. Ibarra.
Vasco de Gama	Simoun.
Alfonso XIII and Manso	Isagani.

306 Supreme Court of the Philippine Islands.

I, R. Heras, acting clerk of the Supreme Court of the Philippine Islands, do hereby certify that in a certain cause pending in said court, wherein C. M. Pendleton was appellant, and the United States was appellee, a final judgment was rendered by said Supreme Court on the second day of March, A. D. 1907, in favor of the said United States, and against the said C. M. Pendleton, and that on the sixteenth day of March, A. D. 1907, said C. M. Pendleton sued out a writ of error to said Supreme Court, directed to remove said cause to the Supreme Court of the United States.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at Manila, Philippine Islands, this twenty-fourth day of October, A. D. 1907.

[SEAL.]

R. HERAS,
Acting Clerk.

307 The United States of America. The Supreme Court of the Philippine Islands.

I, R. Heras, acting clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing pages constitute a true and correct transcript of the proceedings in the case of C. M. Pendleton, plaintiff in error, v. The United States of America, defendant in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands, this twenty-fourth day of October, one thousand nine hundred and seven.

R. HERAS,
Acting Clerk of the Supreme Court of the Philippine Islands.

(Indorsement on cover:) File No. 20969. Philippine Islands, Supreme Court. Term No. 245. C. M. Pendleton, plaintiff in error, v. The United States. Filed January 13th, 1908. File No. 20969.

O

SUPREME COURT

OF THE UNITED STATES

Office Supreme Court, U. S.
FILED.
OCT 3 1908
JAMES H. McKENNEY,
CLERK.

CHARLES M. PENDLETON,
Plaintiff in Error,

vs.

UNITED STATES,
Defendant in Error.

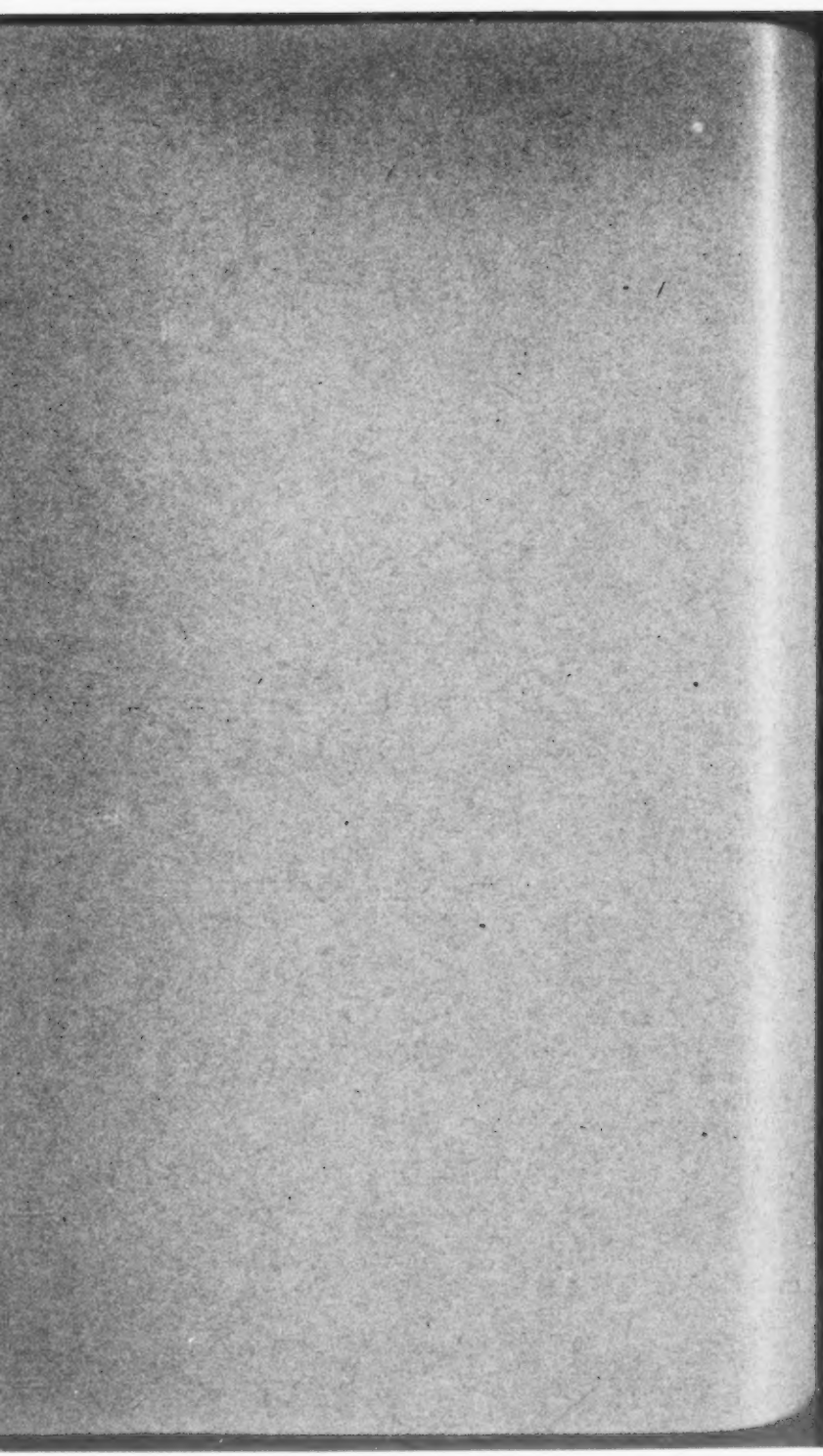
No. [redacted].53,
October Term,
1908.

MOTION FOR ORDER TO PROCEED IN FORMA PAUPERIS.

W. B. BURNET,
Counsel for Plaintiff in Error.

J. H. BLOUNT,
Attorney for Plaintiff in Error.

NEW YORK:
CHAS. P. YOUNG CO., LAW REPORTERS AND PRINTERS,
19 BEAVER STREET. [TEL., 4417 BROAD.]



Supreme Court of the United States.

CHARLES M. PENDLETON, *Plaintiff in Error,*	No. 245.
vs.	October Term, 1908.
THE UNITED STATES, *Defendant in Error*	Motion.

And now comes plaintiff in error above named and moves the Court for an order that this cause proceed *in forma pauperis* and that the Court accordingly order the clerk to proceed to have the record herein printed at the expense of the United States. Costs to be taxed accordingly.

W. B. BURNET,
Counsel for Plaintiff in Error.

J. H. BLOUNT,
Attorney for Plaintiff in Error.

Affidavit of W. B. Burnet in Support of Motion.

STATE OF NEW YORK, }
County of New York, } ss.:

WILLIAM B. BURNET, being duly sworn, on his oath says: He is of counsel for the plaintiff in error herein at the request of William M. Pendleton, his father.

Deponent says he has read the record in this proceeding and that he believes that there is good ground for the reversal of this case under the general principles of criminal law and of the decisions of this Honorable Court; that there are some questions which can fairly be discussed on the record and a fair argument made in the interest of the plaintiff in
5 error, which he hopes will convince the Court that there is error in the record of sufficient gravity and materiality to justify the Court in reversing the conviction.

And, further, deponent says that while he has no acquaintance with the plaintiff in error himself, he does know Mr. William M. Pendleton, the father of the plaintiff in error, and Mrs. Pendleton, his mother; that he has been appealed to by them on the score of friendship to do what he could in the interest of their son in this case; that he knows that they are people in straitened circumstances; that the motion papers herein are printed at the expense of a family friend; that he has been paid no retainer himself, and that his services have been rendered herein without compensation.

So far as deponent is advised, Mr. William M. Pendle-
6 ton is without means to pay for the record herein, and deponent believes that he has no money whatever with which to do so.

Deponent has seen a large number of letters from officers of the United States Army and others, citizens apparently of reputation and standing, expressing great sympathy for the plaintiff in error in his predicament and confidence in his innocence. The said letters further recite, many of them from personal observation, the bravery, good conduct and devotion to the service of the plaintiff in error, and that his reputation seems to have been that of a high-minded soldier and gentleman.

Deponent believes that on a fair presentation of the 7
alleged errors in the record that this Court would be justified in law in reversing the judgment of the Court below, and that in view of the military service and record of the plaintiff in error as a soldier that it would be only fair to give him the opportunity to be heard before this Honorable Court that the alleged errors mays be reviewed by the Court on such representations and argument as deponent and the other attorneys of record in the case may be able to present.

Deponent has stated to Mr. William M. Pendleton that it is not the ordinary practice of this Court to order that the Government shall stand the costs of such a case as this, and has urged Mr. Pendleton to raise the money necessary to have the record printed, which amounts to $430.00, according to the estimate of the Clerk of this Court, but that deponent has been constrained to make this application after 8
several conferences with Mr. Pendleton and being convinced that he is utterly unable financially to meet this expense. Mr. Pendleton has expressed to deponent his personal mortification and chagrin at being compelled to make this application on behalf of his son, but that it is imperative that he do so or else have the petition in error dismissed under the rule of this Court.

Deponent has frequently met Mr. Pendleton and his wife, Mrs. Pendleton, who are greatly concerned for their son's welfare, but Mrs. Pendleton is ill and almost in a state of nervous collapse because of the conviction of her son, and has informed deponent that she has appealed to their family relatives and friends in vain for assistance in this matter other 9
than that that has already been given; that she and her husband have exhausted all their friends to procure money with which to prosecute this error proceeding and unless the Court shall make the order in accordance with this motion the petition in error may be dismissed.

W. B. BURNET.

Subscribed and sworn to before me this
29th day of September, 1908.

MAX C. SCHALLEK,
Notary Public, (L. S.)
N. Y. Co.

Affidavit of William M. Pendleton.

STATE OF NEW YORK,
County of New York, } ss.:

WILLIAM M. PENDLETON, being duly sworn, on his oath deposes and says that he is the father of the plaintiff in error in the above-entitled cause; that his son at the age of 19 years enlisted in the 71st Regiment, U. S. Volunteers, at the breaking out of the late war with Spain, was a member of Company , of which he was First Corporal. His son was with his company when it charged up San Juan Hill, although ordered to lie down. When his term of enlistment in the 71st Regiment expired he re-enlisted in the 29th U. S. Volun-
11 teers and was made Second Lieutenant by appointment of the President, and served in that capacity for the two years that his regiment was in the Philippines. When the 29th Regiment returned to America he was appointed a Lieutenant in the Regular Army by President McKinley, recommended by the Commanding General of the Philippines. He preferred to remain in the Philippines and was made First Lieutenant and Inspector in the Constabulary. He brought his company to such a degree of efficiency that it was detached from the regular service and sent to the St. Louis Exposition for special duty with the Battalion that was sent to the Exposition.

While with the 29th he was put in command of picked troops in the Philippines, and was sent to various islands
12 as the exigencies of the service required.

He was noted for his promptness, efficiency and bravery. A great many letters have been received from his brother officers who uniformly speak of his good qualities and state that his treatment of the natives was uniformly kind and that he was never known to mistreat or abuse them. Shortly prior to the alleged commission of the crime for which he was arrested and convicted he had returned from a trip with his command in the mountains where he had killed and captured a number of prominent Insurrectos, delivering the captured ones to the proper authorities at Cebu, where they had many relatives and friends.

Referring now to the alleged crime and his trial, deponent 13
says that Major Culp, surgeon U. S. Army, testified that the bullet which killed the police officer was fired from a revolver such as was only carried by the native policemen at Cebu and was not of the calibre of the rifles used by the Constabulary, and that it was impossible that the policeman could have been killed by a shot from a rifle in the hands of the plaintiff in error. This testimony was disregarded. Other important testimony was excluded which should have been admitted, showing that the policeman had been dead some hours when Lieutenant Pendleton first saw him instead of having been recently shot as testified by the Government witnesses, *who were all native Filippinos.*

Deponent says that he has sent his son all the money he 14
could raise to pay for counsel fees before the lower and Supreme Court of the Philippines, making up the record, having it translated and other necessary disbursements; that his son is in the Philippine Islands without means and financially unable to have the record in this case printed. His son has been making a small salary and is prevented from accepting much better positions which have been offered him which require a bond being given and which so far as deponent is now advised he is unable to give because of the judgment of conviction against him and the pendency of this cause. That the judgment which is here sought to be reversed, of solitary confinement in chains hanging over him keeps him from any active business and such as his talents and former standing would enable him to command.

15

Deponent says that he himself has exhausted his means and the means of his immediate family and that he is too poor to pay for the printing of the record of this cause; that he is engaged in the business of life insurance; that the business has not been profitable; that he can barely make a living; that he is old and in poor health and should now be in a hospital for operation; that he has his wife, the mother of the plaintiff in error, to support, and that it takes all the money he can earn to support himself and wife; that he has aided his son to the limit of his ability, and therefore in view of the long service and excellent record of his son and his son's

16 and his own present poverty and inability to pay for printing the record herein in accordance with the usual practice of Rule 10 of this Court he prays the Court will order the further proceedings herein to be conducted *in forma pauperis* and that an order may be passed directing the Clerk to print the record and that the costs thereof shall be paid by the Government.

Deponent attaches copies of letters hereto which he makes a part hereof.

WM. M. PENDLETON.

Subscribed and sworn to before me this 29th day of September, 1908.

17 MAX L. SCHALLEK,
(SEAL.) *Notary Public,* (L. S.)
N. Y. Co.

(Exact copy of a letter received from Lieut. Charles M. Pendleton by his mother.)

CEBU, CEBU, PHILIPPINE ISLANDS.
January 25, 1906.

My dear Mama:—

Your last two letters received in which you write of the newspaper reports of my trouble. I would not write before
18 as I thought it would be better to cable in case I was acquitted, which all my friends and myself thought I would be, but the presiding judge was afraid to do so, as he thought he would lose his reputation as a friend of the natives, and therefore gave me 20 years and a fine of $1,500.00.

Do not worry as I have a good lawyer and many friends. My case has been appealed to the Supreme Court where we hope I will be cleared of these charges of which I am in no way guilty.

Thanksgiving night after having spent the evening with friends, I was returning to my quarters when a native policeman reported to me that some other policeman had had some

trouble in one of the suburbs and requested that I accompany 19
him there. Being unarmed I went to the quarters of my soldiers and called for four; taking them in the carriage with me we proceeded to the place indicated by the policeman where there was found a dead native policeman with a wound from some firearm. I directed my men to place the body in the carriage and take it to the Police Station, turning it over to the Chief with such information as I could give. I then returned to my Quarters and went to sleep, and thought nothing more of the matter until my commanding officer told me that I was suspected of having killed this policeman. This was the next afternoon, and when my men were examined they at first told the truth, but when the native prosecuting attorney got them and told them that if they did not testify against me, they would be charged with the crime and arrested, naturally they were afraid, and testified that I was ordered to halt by a 20
policeman and light my lamps, and that after we had passed some words I took one of their carbines and shot and killed him instantly. This however does not agree with the testimony of four doctors. They testified that the wound was caused by a revolver and that it would not cause instant death. They also stated that the man must have been dead some hours before I arrived at the place where he was found. I can also account for the testimony of the men against me for the reason that I have had occasion to punish them several times since they have been under my command, and I have no doubt that they were glad of a chance to get even. The reason why the prosecuting attorney was so anxious to obtain my conviction was because he is a candidate for Governor of this Province, and thought it would help his election if he 21
could win the case against me.

I will go to Manila in a few days to await my trial before the Supreme Court. In case we do not win there it can be taken to the Supreme Court of the United States. Don't worry as all will come out all right. I am in the best of health and have no doubt but that I will be acquitted.

With much love to all, I am,

Your affectionate son,

CHARLES M. PENDLETON.

22 NEW YORK CITY, NEW YORK, Apr. 2, 1906.

To His Excellency,
The Governor-General,
Philippine Islands,
Manila, P. I.

Sir:—

I have the honor to submit the following appeal in behalf of Chas. M. Pendleton, late Lieut. in the Philippine Constabulary.

Lieutenant Pendleton enlisted in the 29th Infantry, U. S. Volunteers in July 1899. He was the first man to apply for enlistment in the Regiment. He was made Sergeant-Major and was so efficient in that capacity that I recommended him
23 for appointment as 2nd Lieutenant and he was appointed by President McKinley and served as 2nd Lieutenant until the Regiment was mustered out of the service, two years later. I found him an efficient and brave officer, gentlemanly in manners and of good habits. I have heard that he has made an excellent reputation as an officer of Philippine Constabulary.

In the event of his being finally convicted of the crime of which he is accused, of which I do not believe him guilty, (the killing of a Filipino policeman), I most heartily recommend him to clemency and earnestly request his pardon.

This I believe to be due him, on account of his good character and military record, and on account of my reasonable belief that he did not kill the policeman.

24

Very respectfully,

E. E. HARDIN,
Major 7th Infantry,
Late Colonel 29th Infantry U. S. V.

Oklahoma, O. T., March 6, 1906. 25

To His Excellency,
The Governor-General,
Philippine Islands,
Manila, P. I.

Sir:

I have the honor to submit the following appeal in behalf of Chas. M. Pendleton, late Lieut. in the Philippine Constabulary.

Lieut. Pendleton served in the 29th Infantry U. S. V., from about July 20, 1899, to June 30th, 1901. During most of that time I was intimately associated with him, both in the field against the Insurgents and in garrison. During his service in the 29th Infantry, he won the respect and admiration 26 of all of his brother officers by his courage and skill while under fire.

I have never known of Lieut. Pendleton doing an unsoldierly act; on the contrary I have often noticed his bravery and zeal.

I cannot believe that a man who has the splendid record this young man possesses, a record of brave deeds done under fire, could be guilty of the crime for which he was recently tried and convicted.

I respectfully add my recommendation for a pardon for this young man, for whom I had a very warm personal friendship.

Very respectfully,

27

James Longstreet,
1st Lt. 13th Cavalry,
Late Captain 29th Infantry U. S. V.

Copy of letter to Governor-General.

28 PRESIDIO OF SAN FRANCISCO, CAL., April 10th, 1906.

To His Excellency,
The Governor General,
Philippine Islands, Manila, P. I.

Sir:—

I have the honor to offer for your consideration my appeal in behalf of 1st Lieut. Chas. M. Pendleton, formerly 1st Lieut., and Inspector, Philippine Constabulary and one time 2nd Lieut. in the 29th U. S. Volunteers.

Lieutenant Pendleton was most favorably known to me as an officer of the 29th U. S. Volunteers in which we served together.

His standing among his brother officers was high both as
29 a gentleman and soldier. From my knowledge of his character and conduct while with the 29th Volunteers, I do not think it possible that he could commit the crime for which he has been tried. His record in the regiment should stand him in good stead in his hour of need, and I pray that every clemency within your power to grant be extended to him.

Very respectfully,

H. L. HAWTHORNE.
Captain, Artillery Corps
Formerly Major, 29th U. S. Volunteers.

---

30 MANILA, P. I., April 4th, 1906.

Mrs. Pendleton,
209 W. 107th St., N. Y.

My dear Madam:—

Since Dec. 1st last I have been constantly devoting a large portion of my time to the defense of your son Charles who was so unfortunate as to be accused of a very serious offense. Probably there is no person, excepting the Prosecuting attorney, who is so familiar with all the facts and circumstances as I am and I have no hesitation in assuring you that in my opinion your son is the victim of circumstances such as any

American in the Islands is liable to find himself involved in. 31
I have always believed in the innocence of Charles and conducted his defence on the theory that he did not fire the shot which caused the death of the Policeman and that the gun which it is claimed was used at the time was not at that moment loaded.

There were many things bearing indirectly on the case which made the defence difficult. A native about the same time had been convicted of murdering a school teacher in the Island of Leyte and the native population were clamoring for an American to be sacrificed. The election for Governor was coming on. I have little doubt that if Charles had been acquitted the result of the election would have been different. We were allowed only a week to prepare for trial and were in a community where Americans have few friends. There was
no disposition on the part of the officials to aid us in ascer- 32
taining the truth. In fact even those who were disposed to see fair play seemed to be afraid for some cause to let it be known.

Charles had only about $100. The Americans contributed to raise a fund but most of them are working on a salary and naturally the amount which they could afford to give was limited. However they are a noble set of men and did what they could.

The whole government here seems to me to be daft on the subject of criminal prosecutions. The only charitable institution supported by the Insular Government so far as I am aware is Bilibid, the penitentiary, and there seems to be an idea that the success of the government can be demonstrated only 33
by the record of the number of convictions. Prisoners awaiting trial are put under heavy bail. In the case of Charles it has been fixed $10,000 which practically means that he must remain in confinement until his case is passed on by the Supreme Court. The result is that where the Government fails to convict, the innocent man is at least subject to many months of confinement which seems to be regarded as adding somewhat to the glory of the prosecution.

When I found that Charles had received no money from the States and that funds were getting short to meet the necessary expenses, I had him send a cable for $500. There was

34 no name signed since that was unnecessary as there was no one in the Islands who would wire for money, except your son, and the necessity for it seemed to be clear enough. The time for filing a brief in the Supreme Court was getting short. I had prepared the brief, without the aid of a stenographer or interpreter, since there were no funds for that purpose. I wanted to make application for bail while Charles was still at Cebu but that involved a trip to Manila and an expenditure of $100 or more. About two weeks ago I came to Manila, completed my brief and it is now in the printer's hands. There are four American Judges and three Native Judges and the official language is Spanish. It is important in my opinion to have the brief printed in both languages but that means
35 an extra $100 besides preparing the English translation, and funds for the one in Spanish have not yet been arranged for.

I am not telling you these things for the purpose of making any complaint but to let you understand the difficulties we encounter. I was aware of the difficulties when I undertook the case. The fact that he is innocent was of little service unless we could demonstrate the truth of it. The fact that your son is an American was a far stronger circumstance against him.

Before undertaking the case it was agreed that I should receive $2,000 for fees and expenses of the case. I have received from all sources within a few dollars of $500, more or less. When the printer's bill is paid this amount will have been expended, practically, in expenses. You can readily un-
36 derstand that I do not feel that the case is in as good shape as it would be in if I had not been embarrassed for funds. I much regret that I could not have the brief in both languages and since there is no library at Cebu, that I could not have devoted more time to the important matter of strengthening my contentions by reference to authorities which I could obtain at Manila instead of doing the typewriting and interpreting which could have been done better by some one else.

I am under especial obligations to the officers of the 6th Infantry U. S. A. who were at Cebu during the trial. Not only the officers but the soldiers believed that Charles did not fire the shot and Captain Kulp and Capt. Farr, both

surgeons of large experience, testified as experts that it was 37
impossible to cause a wound in the manner testified to by the natives.

When my brief is received from the press I will send you a copy. If the case were in America I should have little doubt that Charles would be pronounced not guilty—he never could have been convicted in my judgment—but as we are in the Philippines, I can only say that I believe he should be acquitted on the evidence as it appears in the record. What will be the result I cannot predict. My work is nearly done in the case. The record is made up; the brief prepared, there remains only the oral presentation to the Court when the case is reached.

I was much disappointed at the result of the case in the 38
Lower Court, and some of the Americans were so indignant, I am informed, that they declined to recognize the Judge socially in consequence.

Assuring you that I cannot see how I could have done more for Charles, under the circumstances, and that I will continue to do what I can, and that you and his father have all my sympathy, I am,

Very truly yours,

JOHN W. SLEEPER.

39

40

J. G. WHITE & COMPANY, INC.

ENGINEERING CONTRACTORS

FOR

THE PHILIPPINE RAILWAYS

OFFICE OF CHIEF ENGINEER

MANILA

Cable Address:
Conphilry, Manila

Code Used:
Western Union

P. O. Box 444

Telephone 584

E. J. Beard,
Chief Engineer

April 26, 1907.

Dear Madam—

Your letter of March 21st duly reached Mr. Belden, general superintendent of construction of the J. G. White & Company's contract, but it was several days before we could
41 locate your son, owing to the fact that he is in the railway department.

In order to assure you, as quickly as possible, that your son has friends here, I cabled our New York office on the 24th instant, as follows,—

> "Notify W. Pendleton, 74 Broadway, son doing well in our employ; has our friendship. Case appealed Supreme Court of the United States."

I trust this message has been duly delivered to you.

Your son tells me that he has written you regularly and that you are now fully informed as to the present condition of his case. It will probably be a long time before the matter
42 is entirely settled, but in the meantime you can rest assured that what his friends here can do, they will,—and there are many of them. I only came to know him a short while ago when he accepted employment in our office, since which time he has performed his duties very satisfactorily; in fact, so much so as to win the friendship of all of us, both on account of himself and the excellent manner in which he performs his duties.

I will say that he seems perfectly competent to look after his own interests here, and as I have before said, whenever he needs help that can be given, it is forthcoming.

As a strange coincidence in connection with your letter,

I will say it first fell into the hands of Mr. Belden, whose wife almost immediately recognized your name and thinks she recalls you, but says she most particularly remembers your mother, Mrs. Talmadge, and she is exceedingly glad to hear that she is still living. She told me she would write Mrs. Talmadge as soon as she recovers somewhat from present indispositions. 43

I sincerely hope that this short letter will be some relief of the distress I know you must suffer.

Very respectfully,

E. J. Beard.

B-b

Mrs. Lizzie Talmadge Pendleton,
74 Broadway,
New York City, U. S. A. 44

45

OCT 19 1908
JAMES H. McKENNEY,

Supreme Court of the United States.

CHARLES M. PENDLETON,
Plaintiff in Error,

vs.

UNITED STATES,
Defendant in Error.

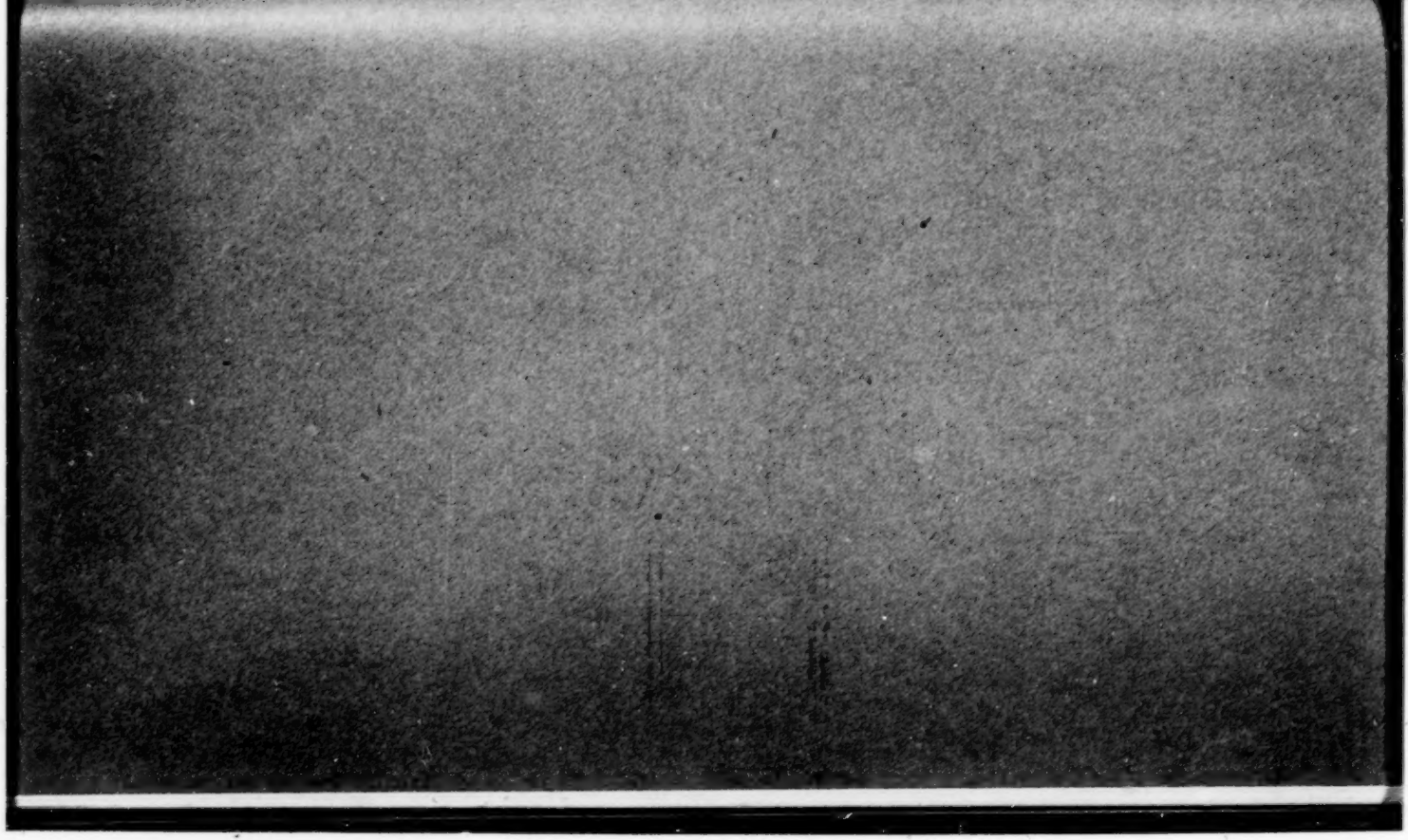
No. 53.
October Term,
1908.

MEMORANDUM FOR PLAINTIFF IN ERROR ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

W. B. Burnett,
Counsel for Plaintiff in Error.

New York:
Shar. P. Young Co., Law Reporting and Printing,
10 Beaver Street. [Tel., 4417 Broad.]

1908.



Supreme Court of the United States.

CHARLES M. PENDLETON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 245.
October Term, 1908.

Memorandum for Plaintiff in Error on Motion for Leave to Proceed in Forma Pauperis.

The plaintiff in error was convicted by the Trial Court of Cebu, Philippine Islands, of the crime of murder and sentenced to twenty years in solitary confinement in chains (*cadena temporal*), twenty years subsequently modified by the Philippine Supreme Court to seventeen years.

The defendant enlisted soon after the breaking out of the war with Spain in the 79th U. S. Vols., served with his regiment until his term of enlistment expired, when he again enlisted in the 25th U. S. Vols., and was sent with his regiment to the Philippines, where his second term of enlistment expired, and he again enlisted in the Philippine Constabulary. He had several promotions during his terms of service for honorable and brave conduct and won the esteem and friendship of his fellow-officers, as is testified to by about one hundred letters received from them now in the possession of his father. The young man enlisted at the age of 19. He has been in the service as Corporal, Sergeant, Second Lieutenant and First Lieutenant since he was old enough to earn money for himself, and the army pay in the distant service of the Philippines has not been sufficient to enable him, with the extraordinary

expenses involved, to accumulate but little money. Such as he did save up was spent on his trial in the Court of First Instance and on appeal to the Supreme Court of the Philippine Islands and the preparation of the case in error to this Court. He is absolutely without funds.

His father and mother are citizens of New York City, where his father is engaged in business as a life insurance agent, and makes but enough money to barely support himself and his wife, the mother of the plaintiff in error.

Mr. and Mrs. Pendleton have appealed to me to present their son's case to this Court. They have not money enough nor can they raise the money for printing the record, and therefore this application.

They have exhausted their friends and relatives in amounts contributed to the expense of the case at the trial, the proceedings before the Supreme Court in the Philippines, and now have no money for the further prosecution of this case.

The dreadful sentence of the Court below, the fine military record of the defendant and his present inability to further prosecute this case makes, together with the manifest uncertainties and certain inconsistencies in the testimony, and errors made by the Trial Court in the admission and exclusion of evidence prejudicial to the defendant, a case which appeals strongly to one's sympathies and furnish the grounds for this application.

Not to burden the Court with a volume of letters, several are appended to the motion papers, which indicate fairly the estimate in which the defendant was held by his brother officers. The affidavit of Mr. Pendleton states his inability to raise the money with which to proceed with the cause, and the record itself will demonstrate errors to which we hope to invite the more careful attention of the Court on the final hearing.

The conviction was had upon the testimony of four native police officers, who, from their testimony, seem prejudiced against the defendant and desirous of securing his conviction. Against their testimony is the absolute, positive testimony which the Trial Court disregarded of Major Kulp and surgeon of the regular army, who saw the body of the man who was shot within a half hour after the alleged shooting by the

defendant, and who testified that it bore the evidence of death having occurred at least eight hours prior to that time. There was also testimony that the wound could not have caused immediate death, that the rupture, or, as the surgeons designate it, the intersection of the descending colon might have caused death, but not immediate. There was also the testimony of Major , a surgeon in the regular army, who testified that the bullet which was found in the body of the dead policeman was such as was used by the police in Cebu and was not a bullet from a Springfield rifle, which was the arm used by the Constabulary, and, as testified to by the prosecution's witnesses, was the rifle said to have been used by the defendant in shooting the policeman. There was also the unimpeached testimony of natives and American officers that a revolver and two exploded shells and one unexploded shell was found as soon as it began to get light in the morning within three paces of where the body of the policeman had lain, that the revolver was such as was used by the police and not by the Constabulary, and other testimony of like effect which the Trial Judge excluded or disregarded. Against the objection and exception of the defendant's counsel the Trial Judge took the witnesses with the Fiscal, or prosecuting officer, to the scene of the alleged murder, where the body of the policeman was found, and there the Judge and the Fiscal practically directed the witnesses as to where they stood and what they saw at the time of the shooting. This proceeding, duly excepted to, was a mere travesty upon the orderly trial of the cause.

Counsel has not been able to go through the record and present a more careful analysis of it, because it has not been printed, is on file in the office of the Clerk and he has not had the time to spend in the Clerk's office in carefully going over the objections and exceptions taken to the many errors made by the Court, but deems that the statements herein made are sufficient to indicate to the Court that there is at least just ground for argument and that the real, substantial interests of the defendant were jeopardized by the rulings of the Trial Judge and that the errors assigned and complained of go not to the form, but to the very substance of the defendant's rights.

The Assignments of Error are:

1.—The accused has been compelled to be a witness against himself in violation of Article 5 of Law of Congress of July 1st, 1902.

2.—The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

3.—The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt.

The appalling sentence of twenty years in solitary confinement and in chains for a young man who has given seven or eight of the best years of his life to his country we hope will incline the Court to grant the desired order. There have been instances in the history of this Court where a like order has been allowed, and we submit if there ever was a case where the Court is justified in making such an order that this is one.

Respectfully submitted,

W. B. BURNET,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
AUG 17 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 53.

CHARLES M. PENDLETON, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES H. BLOUNT,
Attorney for Plaintiff in Error.

HENRY E. DAVIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 53.

CHARLES M. PENDLETON, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error was convicted by the trial court at Cebu, Philippine Islands, of the crime of murder, and was sentenced to twenty years in the penitentiary, which sentence was subsequently modified by the Philippine Supreme Court to seventeen years.

The case comes before this court upon three assignments of error (R., 29), as follows:

1. The accused has been compelled to be a witness against himself in violation of Article V of the Law of Congress of July 1, 1902.

2. The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

3. The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt.

The indictment or accusation is dated December 2, 1905, and charges the defendant with killing one Leoncio Unabia,

a municipal policeman of the city of Cebu, at or about 2.00 a. m. of December 1, 1905, by a shot from a gun.

The corpse was brought to the police barracks in Cebu between 2.00 and 3.00 a. m. December 1, 1905. On the same day defendant was subjected by the district attorney's office to an examination under oath, the object of which was to get evidence against him.

First Assignment of Error.

THE DISTRICT ATTORNEY'S TREATMENT OF PLAINTIFF IN ERROR.

That the accused has been compelled to be a witness against himself in this case, and that there has been a substantial violation of the Act of Congress of July 1, 1902, which protects him from being so compelled, will, we confidently submit, become clear when said act is read in connection with the parts of the record hereinafter pointed out and the Act of the Philippine Commission under which the district attorney in this case acted in subpœnaing the defendant and subjecting him to examination under oath, namely, Act. No. 302.

Act No. 302 of the Philippine Commission provides, in Section 2, as follows:

> "SEC. 2. The fiscal of any province may, if he deems it wise, conduct investigations of crimes and misdemeanors by taking oral evidence of reputed witnesses, and for this purpose may issue subpœnas summoning witnesses to appear and testify under oath before him, and the attendance or *evidence* of absent or recalcitrant witnesses *may be enforced* by application to the justice of the peace of the municipality in which the investigation is being held, or the Court of First Instance of the province. No witness summoned to testify under this section shall be under obligation to give testimony tending to criminate himself." * * *

On this point attention is invited to the affidavit of defendant (R., 6) in support of the motion of counsel pertaining to the same subject (R., 5).

Later on, when defendant's counsel, Mr. Sleeper, took hold of the case, he presented a motion to the trial court (R., 9) praying that the district attorney be not permitted to use the statement made by the defendant in the office of the district attorney, and the court having denied this motion on the ground that it was premature, because, as yet, the statement made by defendant to the district attorney had not been offered in evidence, defendant excepted.

We respectfully insist that this was error so grave and so material as to call for a new trial. It left defendant open to the fire of a masked battery. What defendant had said on the day the corpse was brought to the barracks, and he was summoned to the district attorney's office under implied suspicion of murder, under abnormal and exciting circumstances, in the presence of people doubtless anxious to convict, having been put upon the rack and subjected to a presumably searching, grilling cross-examination by an able lawyer, the prosecuting attorney, in the absence of any counsel of his own, was taken down in writing in Spanish, and he was required to sign it. That this was a star chamber proceeding we feel confident this court will believe. The district attorney was a Filipino, educated under Spanish methods. The defendant was not a lawyer, and did not know what his rights were. While the statute contains the provision that

> "No witness summoned to testify under this section shall be under obligation to give testimony tending to criminate himself,"

nevertheless, the statute does not make it incumbent upon the district attorney to inform the defendant of his rights thereunder. It should have gone further and required that this be done, as do similar provisions of law in the different

States of this country. Whatever may be the true law of this case, it seems to us absolutely certain that that district attorney at Cebu did, by cross-examination under oath in his office, get out of defendant all he could, with a view to damaging him, and without telling him that he had a right to decline to give evidence against himself. We submit that a proper respect for the Act of Congress upon the part of this prosecuting attorney required, even in the absence of any statutory direction in the Act of the Philippine Commission, that he should have informed the defendant of his right not to be compelled to be a witness against himself. If the prosecuting attorney had so told defendant, the attorney would have said so in court. Defendant swore (R., 6) that he supposed he had no such right, and that he was not notified to the contrary. This state of facts must, therefore, be accepted.

We all know, either by observation or experience, the keen discomfort and the great disadvantage of being on the witness stand and having hostile counsel hold in his hand as an aid to cross-examination a paper signed by the witness, and glancing threateningly from the paper to him, and from him back to the paper, as questions beginning, for example, with "Now, Mr. So and so, is it not a fact that on such and such a date you testified thus and so," reading from the paper.

Well aware of this, counsel for defendant in the court below, as soon as the court overruled his aforesaid motion (which was designed to prevent the district attorney from using on the trial in any way the sworn statement previously obtained from defendant), moved that the statement be filed in court (R., 9, last paragraph of the motion). This motion having been denied, the defendant's counsel, very naturally, did not let him go on the witness stand, abstained from exposing him to a masked battery. For if he had become a witness and there had been any discrepancy between his oral testimony and the narrative the district attorney had gotten out of him in the star chamber sweat-box of his office, do we

not know that the district attorney's hordes, his assistants, clerks, copyists, *et al.*, would have been brought in in rebuttal to substantiate line for line, and word for word, "i" for "i," and "t" for "t," what they had taken down as being his statement?

The action of the district attorney in this case under this Act 302 of the Philippine Commission is directly subversive of that part of the Fifth Amendment and the Act of Congress copied therefrom, which provides that no man shall be compelled to be a witness against himself in any criminal proceeding.

Is it not ignoble quibbling, unworthy of any conscientious attempt at constitutional interpretation, to say that the "statement" corkscrewed out of this defendant in the district attorney's office in answer to a subpœna was not "used" at the trial, when the fact of its existence in the possession of counsel for the Government at the time clearly was used as a "big stick" to browbeat him into silence, and as a club brandished in the background to intimidate him from the exercise of his right to testify in his own behalf, thereby laying the foundation of just such an argument by counsel for the Government as was afterwards in fact urged, viz., that defendant's silence was an evidence of guilt?

Second Assignment of Error.

The Right of Silence.

The 5th Amendment to the Constitution of the United States provides that—

> "No person shall be * * * compelled in any criminal case to be a witness against himself."

The Act of Congress of July 1, 1902, 32 Stat., 691, known as the Philippine Government Act, contains exactly the same language.

General Military Order No. 58, issued by the United States Military Governor in the Philippines on April 23, 1900 (Vol. 1, Public Laws of the Philippine Commission; see sec. 15, subsec. 3, p. 1083), had already conferred upon the inhabitants of the Philippines this same right, and also the right to testify in his own behalf if he elected to become a witness *for* himself, the exercise of this last right rendering him subject to cross-examination. But this is followed by a provision that—

> "His neglect or refusal to be a witness shall not in any manner prejudice or be used against him."
>
> (Cited fully in Kepner *vs.* U. S., 195 U. S., 112.)

In the case of Ruloff *vs.* The People, 45 N. Y., 213, it was held:

"Upon a criminal trial, the presiding judge has no right in charging the jury to allude to the fact that the prisoner has not availed himself of the statutory privilege of being a witness in his own behalf," and this is put upon the ground (p. 222) that such an allusion is an intimation by the judge "of the *effect upon his mind* of the omission of the accused to explain by his own oath suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence."

> Cited and followed in People *vs.* Doyle, 58 Hun. (N. Y.), 535.

In Wilson *vs.* United States, 149 U. S., 60, it was held:

> "The Act of Congress of March 16, 1878, 20 Stat., 30, c. 37, having provided that a person charged with the commission of crime may, at his own request, be a competent witness on the trial, but that 'his failure to make such request shall not create any presumption against him,' all comment upon such failure must be excluded from the jury."

The "comment" excepted to in Wilson's case was the comment made by the district attorney in the course of his argument. His remarks were excepted to, and the trial judge sustained the exception, but did so in such extremely mild language that the Supreme Court of the United States (p. 67) said:

> "By this action of the court in refusing to condemn the language of the district attorney and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he was an innocent man he would have gone on the stand as the district attorney stated he himself would have done."

The trial court, in the course of its decision in the case at bar, significantly remarked (R., 11):

> "The accused did not use his right to testify in his own favor."

And the Supreme Court of the Philippines, in sustaining the trial court, said (R., 19):

> "We have not the benefit of his (defendant's) recollection."

In presenting the Government's case before the Philippine Supreme Court, the Attorney General of the Philippines said in his brief:

> "No direct proof was presented by the defense to contradict the facts stated by the witnesses for the prosecution; nor did the defendant testify in his favor to deny the grave crime with which he is charged."

The very just and kindly reason which animates laws clothing defendant with the right to remain silent is stated by this honorable court thus:

> "It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove the prejudice against him" (Wilson *vs.* United States, 149 U. S., 66, *supra*).

The remark of the Philippine trial judge in the case at bar about the defendant's failure to testify, taken in connection with the rest of the decision, shows a mental attitude not keenly alive to the wise provision of General Order 58, above cited, which protects a defendant's right of silence.*

In America any allusion to defendant's silence made before a jury, whether by court or counsel, must be safeguarded by specific definite recognition of his *right of silence*. Is not the reviewing court in the Philippine Islands, which does not see the witnesses at the trial, or have the benefit of judging their credibility by their manner of testifying, entitled to know that the trial judge, who is judge and jury there, in considering the case against defendant, did in fact have due regard to his right of silence and that in weighing the whole case he *did not* consider that silence among the facts and circumstances which were weighed in the balance by him in reaching a verdict of guilty? Yet the trial court *did* consider the circumstance of defendant's failure to testify to his prejudice. He does not seem to have been mindful that the philosophy of the law (as set forth in Wilson *vs.* United States, above quoted) recognizes many possible good reasons, consistent with innocence, for failure of a defendant to testify in his own behalf. He speaks of the prosecution as having offered an "abundance of proof, which *in case the court should give it full credence* would establish the guilt of the accused beyond a reasonable doubt," and then adds, among other things, by way of contrast, "the accused did not use his right to testify in his own favor" (R., 11).

In weighing the State's case to determine whether or not he should "give it full credence," the court specifically notes *as relevant to the question* the neglect of the defendant to become a witness, which circumstance Military Order No. 58 declares "shall not in any manner prejudice or be used against him." In the next clause of the same sentence the court also notes, as being another weak point in the defense, "and no eye-witness has testified favorably to him."

The theory of the defense was that the prosecution grew out of a conspiracy, supported by perjury and animated by malice, and relied mainly upon expert testimony to show that the bullet wound claimed to have been inflicted by defendant, could not have been made as claimed, and upon discrepancies in the testimony for the government.

The decision of the trial court (R., 11) against defendant's contention, beside a general review of the whole case, urged three arguments:

First. Paucity of proof in behalf of the defendant.

Second. His failure to testify in his own favor.

Third. His failure to get any eye-witnesses to the shooting, to rebut the evidence of the Filipinos who claim to have been eye-witnesses.

In discussing the true and correct attitude of the State toward a defendant in a criminal case, Underhill's Criminal Evidence, paragraph 67, says: "It is the duty of the jury to exclude his silence entirely from their consideration." In support of this doctrine the author cites a case from Indiana, Showalter *vs.* State, 81 Ind., 562, 566, which rests on a State statute expressly declaring that defendant's failure to testify—

> "Shall not be commented upon or referred to in the argument of the cause."

We submit that this Indiana statute embodies the most enlightened spirit of contemporary jurisprudence regarding the right of silence of defendants in criminal cases.

Staples *vs.* State, 89 Tenn., 231, cites and follows the Showalter case, though the Tennessee statute does not specifically forbid, as does the Indiana statute, any and all allusion by counsel in argument to defendant's failure to testify, but simply provides that such failure—

> "Shall not create any presumption against him."

This is much narrower and milder language than that of the Philippine statute, above quoted, which says:

> "His (defendant's) neglect or refusal to be a witness shall not *in any manner* prejudice or be used against him."

The Illinois statute upon this subject is a striking legislative recognition of defendant's right to remain silent. Like the Indiana law quoted, it forbids any reference to or comment on the fact of failure by the defendant to testify. And the Illinois courts (see Quinn *vs.* People, 123 Ill., 333, 347) and cases cited hold that *any such reference or comment calls for reversal of a verdict of guilty.*

Where the record shows that the court considered that which a jury could not have considered, the vice is the same.

The leading cases from the Philippines involving life or liberty that have so far come before this court are Kepner *vs.* United States, 195 U. S., 100, and Dorr *vs.* United States, 195 U. S., 138.

Kepner, it will be remembered, was a lawyer practicing in the city of Manila who was charged with embezzlement of the funds of a client. He was acquitted by the court of first instance, whereupon the Government appealed, over Kepner's protest, to the Philippine Supreme Court. That court upheld the Government's right of appeal, reversed the trial court's verdict of not guilty, found the defendant guilty, and sentenced him to a term in the penitentiary and to be

deprived of the right of suffrage, etc. He urged former jeopardy. This court reversed the Philippine Supreme Court, holding that the acquittal by the court of first instance was final.

We note that in his dissenting opinion in the Kepner case (p. 137) Mr. Justice Brown deprecates the amount of power the majority opinion places in the Philippine courts of first instance. He says:

> "It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals."

Perhaps the learned judge did not have in mind, at the moment, that the Act of Congress in question (the Philippine Government Act of July 1, 1902) did much toward distributing power theretofore centralized—congested—in one executive head; that it was intended for that purpose; that to strengthen the hands of the Philippine trial courts was to lift them in the eyes of the people; that the opinion of this court in the Kepner case tended to reduce the possibility of any imputation (from any decent source hostile to the success of American rule in the Philippines) of subserviency upon the part of the judiciary to the executive, and thus tended to increase the confidence of the people in the independence of the former; *i. e.*, assuming the Philippine trial judges to be honest.

We also note that Mr. Justice Harlan, in his dissenting opinion in the Dorr case, 195 U. S., 154, deprecates the too great power which the majority opinion will, he thinks, give to the Philippine courts of first instance by sustaining the law that makes a judge of first instance practically judge and jury. There Justice Harlan reaffirms his well-known views about the Constitution following the Flag and about the system of jury trial as a bulwark of civil and political liberty.

But however widely the learned members of this honorable court may differ upon some of the matters that have arisen

since the Spanish War in connection with the government of our insular possessions, however liberal, if you please, toward the government, the majority of the court may have been heretofore in holding, for instance, that a verdict of acquittal by a one-man court, the court of first instance, is final, and that the people of the Philippine Islands have no right to a jury trial, but must submit all questions of life, liberty or property to the one-man trial court, nevertheless, we feel confident that this court will be a unit upon the proposition that in questions like the one at bar the rules of law governing the trial of a criminal case by a judge of first instance in the Philippines, in so far as they are analogous to those governing a trial before a judge and jury in the United States, should be construed strictly—strictly against the Government, or, in other words, liberally toward the defendant. In the opinion in the Kepner case, Mr. Justice Day, in tracing the steps by which the Philippine Courts reached their present status, viz.,

Mr. McKinley's instructions of April 7, 1900, to the Taft Philippine Commission,

Military Order No. 58 of the American Commanding General in the Philippines, issued April 23, 1900, and

The Act of Congress of July 1, 1902, commonly called the Philippine Government Act,

Speaks (p. 122) of the intention uniformly manifest,

> "To adopt a well-known part of the fundamental law of the United States, and to give much of the beneficent protection of the bill of rights to the people of the Philippine Islands."

After quoting at length from Mr. McKinley's instructions aforesaid, Justice Day remarks (p. 123):

> "These words are not strange to the American lawyer or student of the Constitution or of history. They are the familiar language of the bill of rights, and etc."

And again (p. 124):

> "When the Congress came to pass the Act of July 1, 1902, it enacted, almost in the language of the President's instructions, the bill of rights of our Constitution."

Paragraph 15 of General Order 58, which follows our Fifth Amendment by exempting the defendant in a criminal case from being compelled to become a witness against himself, also provides in the same connection that he may become a witness in his own favor if he wants to, but that his failure to do so "shall not in any manner prejudice or be used against him."

Certainly General Order 58 and the Act of July 1, 1902, constitute the fundamental written law—the Constitution, so to speak—of the existing Philippine Insular Government, within the meaning of the language of this court in the great case of Boyd *vs.* United States, 116 U. S., p. 616, where Mr. Justice Bradley, in one of the finest passages in the whole opinion (p. 635), reminds us of the rule that—

> "Constitutional provisions for the security of persons and property should be liberally construed."

General Order 58 is, as may be seen from the most casual reading of it, a product of American legal minds. The part which exempts a defendant from being compelled to testify against himself is taken from the Fifth Amendment. The part which throws an additional safeguard around the defendant by guaranteeing him the right of silence in case he does not wish to testify in his own behalf, also has its prototype in American jurisprudence. We find something almost identical with it in the Act of Congress of 1878. We find something substantially like it in the laws of nearly every State in the Union. Why?

For the lawyer at all familiar with the constitutional history of his country as reviewed in some of the great opinions of its great judges, more especially of this court, the answer

is not far to seek. Yet when he finds it, and understands the grave importance of the doctrine underlying it to the cause of human liberty, he becomes a better patriot, as well as a better lawyer for having studied the noble juridical structure whereof the Fifth Amendment to the Constitution is the corner-stone.

As the Fourth Amendment was aimed against unreasonable searches and seizures instituted for the purpose of procuring evidence against a prospective defendant, so the Fifth Amendment was aimed against the practice of compelling a man to testify against himself. It was intended to protect the right of silence.

Says Mr. Justice Bradley, in the Boyd case (*supra*), at page 633, speaking of the intimate relations between the two amendments:

> "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment" (116 U. S., 633).

The learned justice then goes on to elaborate the analogy between the proceeding whose validity he was passing on, which was one for the compulsory production of private books and papers, and the act of compelling the person to be a witness against himself. Among other things he says:

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet * * * it contains their substance and essence, and effects their substantial purpose."

So we say that though considering to his prejudice the defendant's failure to testify "is divested of many of the aggravating incidents" of actually compelling him to be a witness against himself, "yet it contains their substance and essence and effects their substantial purpose," and, as Justice Bradley adds, in the next sentence after the words just quoted:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; *but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal methods of procedure.* This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

If a defendant's silence is to be taken against him, he will necessarily be afraid to remain silent. If his silence is to be taken *against* him, his right of silence might as well be—*is*—taken *from* him.

> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon" (116 U. S., 635).

Kepner's case, it will be recalled, is the one in which this court held that a judgment of acquittal by a Court of First Instance in the Philippines was final and that the government had no right of appeal therefrom. In that case the Philippine viewpoint and contention is stated by the Philippine Attorney General thus:

> "The proceedings before the Court of First Instance and the Supreme Court of the Philippine Islands are but parts of a single continuous trial" (195 U. S., 107).

In reversing the Philippine Supreme Court this court recognized that this had been the Spanish law, but held that

it no longer was the law. You say of the Spanish system of courts (p. 121):

> "The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally acquitted or convicted until the case had been passed upon in the Audiencia, etc." "The trial was regarded as one continuous proceeding." * * *
>
> "The change introduced under Military Order No. 58, as amended by Act 194 of the Philippine Commission, made the judgment of the Court of First Instance final." * * *

That the trial court in this case *did* consider the circumstance of defendant's failure to testify is *a fact stated by the Philippine Supreme Court* (R., 26, folio 56). On page 25 of the record is set out a motion addressed to the Supreme Court of the Philippines praying a rehearing. This motion contained, as one of its exceptions to the decision, that the trial court in its decision "*considered this circumstance as prejudicial to the defendant.*" The motion further complained that "the Attorney General adduced the same circumstances in his brief in this court in the following words:

> "'No direct proof was presented by the defense to contradict the facts stated by the witnesses for the prosecution; nor did the defendant himself testify in his own favor to deny the grave crime with which he is charged.'"

It will thus be seen that the Attorney General of the Philippines followed in the erring footsteps of the Court of First Instance in disregarding the provision of law that—

> "His neglect or refusal to be a witness shall not in any manner prejudice or be used against him" (G. O. 58, par. 15 (3)).

In passing on this point, the Philippine Supreme Court says that—

> "although *the fact that the defendant declined or failed to testify* as a witness *was taken into considera-*

tion by the Court of First Instance, this court, in deciding the cause, did not take said fact into consideration, but rendered the decision in accordance with the proofs presented at the trial, and therefore, the new trial solicited is denied."

We respectfully submit that this finding of the Philippine Supreme Court that "the fact that the defendant declined or failed to testify as a witness *was* taken into consideration by the Court of First Instance," brings this case clearly within the prohibition contained in General Order 58, section 15, subsection (3) cited *supra*, where it is provided that his neglect or refusal to be a witness shall not in any manner prejudice or be used against him.

The Philippine Supreme Court, we submit, misapprehends the functions conferred upon it by Congress and the Philippine Commission in relation to reviewing decisions of Courts of First Instance. They appear to be of the opinion that they have the same authority in this regard as was possessed by their Spanish predecessor, the Audiencia. The Audiencia, which was the Philippine Supreme Court under the Spaniards, used to read the record sent up from the court below, the Court of First Instance, and then say whether or not, if they had been in the place of the court below, they would have decided as he did. They considered themselves as free to pass upon the credibility of any witness whose testimony was set out in record as the trial court had been, and further, they believed and acted upon the belief, that their facilities for determining such credibility were nowise inferior to those previously enjoyed, in any case under review, by their colleague of the trial court. AND THEY WERE RIGHT.

Their law was different from ours. Criminal trials in Courts of First Instance in the Philippine Islands under the Spanish régime were really conducted by a series of depositions. These often lasted through long periods of time. The supremely human element—the APPEARANCE of the witnesses and their MANNER on the stand, etc.—upon which we

lay so much stress in seeking to determine the credibility of testimony, when we place in jeopardy the liberty of a citizen by charging him with crime, placing him on trial before a jury, and confronting him with the witnesses against him, did not enter into the equation appreciably. The reviewing court passed on the decision of the court below about as a reviewing court in this country would pass on an equity proceeding based upon written testimony submitted by affidavits and interrogatory depositions. The legal aspect of our occupation of the Philippine Islands which grew out of the war with Spain was presented in General Order 101, July 18, 1898, the same being a General Order of the War Department publishing to the Army a letter of President McKinley to the Secretary of War intended for the guidance of the American Military Commander in Cuba. Like instructions were also given later on to the Commanding General of our troops in the Philippines.

This order purported to state and apply the law of nations in such cases. It said in part:

> "Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things." * * *

Hence, impliedly, the old law, if incompatible, was not binding on the Military Commander, and he might change it, in his discretion, to make it conformable to the new order of things. In the Philippines this was done by what is known as General Order 58 (*supra*). Previous to that time the law of criminal trials under our predecessors in sovereignty had been as hereinabove stated. Very often depositions were taken in the absence of the defendant. Very often depositions were taken by the clerk in the absence of

the judge. By General Order 58 the defendant had conferred on him a right he had not before, viz., to be confronted by the witnesses against him. The reason of this law is so familiar to American lawyers that to state it here would be superfluous but for the fact that the American Supreme Court in the Philippines apparently considers its powers in reviewing and passing upon a decision of a court of first instance to be practically the same in scope as were the corresponding powers of the Audiencia under the Spaniards. In this, this court was held that they are mistaken.

Kepner *vs.* U. S., 195 U. S., 107.

By General Order 58 the old order of things was changed in this respect also, viz., every man charged with crime was given a right to be confronted with the witnesses against him, so that the court, the trial court, seeing both him and his accusers and their witnesses, might the better "well and truly" try the question of his guilt or innocence. The Philippine Supreme Court appear to consider that in reviewing a conviction they pass on the case *de novo*, with the same scope of authority in the premises as if they were hearing and seeing the witnesses and observing their manner on the stand in defendant's presence. The vice of this reasoning is—lies in the fact—that the spirit of our laws demands the most direct processes and refuses to believe that the weight of human testimony can be determined as correctly by reading it afterwards as by hearing it delivered in the defendant's presence. When once the Philippine Supreme Court found (as they did find, R., 26) that the trial judge violated a fundamental statutory provision, made in amplification of the cognate clause of the Constitution of the United States, by considering and weighing against this defendant and to his prejudice a vital circumstance which he is by statute forbidden to consider, then they should have remanded the case to the Court of First Instance for a new trial.

The trial court said (R., 11) "the prosecution has presented an abundance of proof which, *in case the court should*

give it full credence, would establish the guilt of the accused beyond all reasonable doubt," and then, turning to a consideration of the defendant's side of the case for the purpose of weighing it in the balance, added, immediately after the words just above-quoted, "On the other hand, the accused did not use his right to testify in his own favor, and no eye-witness has testified favorable to him."

Here are two items deemed by the court to be prejudicial to the defendant:

(1) The failure of the accused to testify.

(2) His failure to present any eye-witnesses to the shooting to rebut the testimony of the Filipinos who claimed to have been eye-witnesses, and who made out the government's *prima facie* case.

The attitude of the trial court is, practically, one of assuming that what the government's witnesses say must be true, because (among other reasons) the defendant did not take the stand and deny it. The weight the trial court might have attached to a denial, had one been made, was to the reviewing court an unknown quantity—as unknown as the algebraic *x*. Such a denial, added to the rest of defendant's testimony, might have outweighed the testimony against him, and produced in the mind of the court at least that reasonable doubt which entitles a defendant to acquittal, even if it did not demonstrate his innocence. The reviewing court say (R., 26, folio 56):

> "This court, in deciding the cause, did not take said fact (the defendant's failure to testify) into consideration, but rendered the decision *in accordance with the proofs presented at the trial, etc.*"

Once having admitted that the court below did take "said fact" into consideration, the Philippine Supreme Court should have reasoned, in our own humble judgment, substantially after this manner:

"Not having been present at the trial, we are not in a position to say how much the government's evidence and the

evidence for the defense impressed the trial court. In other words, we do not know *how much* it *weighed* with him. He has committed error in considering, to the prejudice of defendant, a circumstance he should not have considered. If he had not taken this circumstance into consideration, we might (possibly) have affirmed the verdict as being authorized by the evidence; for reviewing courts reverse only where the verdict is strongly and decidedly against the weight of the evidence, or without evidence to support it, or the like. Reviewing courts constituted on the American plan bear ever in mind the immensely superior opportunities of the trial judge for determining credibility of testimony adduced orally before it, and for determining the relative weight thereof. But whether the government's testimony would have outweighed defendant's side of the case, as actually presented in the court below—the evidence or lack of evidence offered by him—if the court had not erroneously placed in the scale against him certain *lack of evidence* which the law forbade it to consider, is a question we cannot answer; we therefore cannot render *a decision in accordance with the proofs presented at the trial* (which they did—the language italicized is from the decision of the reviewing court, R., 261), because, not having heard the witnesses, we cannot say that the weight it had with the trial court was such as to have made a verdict of guilty *legally inevitable even when weighed in the balance with the testimony offered by the defendant* PLUS *the circumstance of defendant's failure to testify*. The presumption of law is that this departure from the requirements of the statute prejudiced defendant's case; that it was material error. In some parts of the United States such departure is made, peremptorily and unconditionally, fatal error, requiring reversal—necessitating a new trial. General Order 58 does not require in specific language, but we are of the opinion that the intention of that order in thus absolutely prohibiting consideration of a defendant's failure to testify, was to guarantee to him an absolute right, depriva-

tion of which would, if permitted by judicial construction, tend to compel every person charged with crime to become a witness against himself. For, manifestly, if the right of silence be not respected by the courts and diligently guarded, defendants must go on the stand, moved thereto by the instinct of self-preservation; and, once there, they must, on cross-examination, become witnesses against themselves, and the constitutional guarantee is nullified."

Subsequent to the preparation of the foregoing, in our further search for authoritative support of what we believed ought to be the law, we find a case decided by Judge Lurton when he was on the Supreme Bench of Tennessee, in 1890 (Staples *vs.* The State, 89 Tenn., 231), which we confidently submit as setting forth the true law, especially in reference to our contention that any trespassing upon a defendant's right to abstain from testifying is a substantial violation of the constitutional provision that he shall not be compelled to be a witness against himself.

Says Judge Lurton (pp. 232, 233):

> "The Act of 1887, ch. 79, permits the defendant in a criminal trial, 'at his own request, but not otherwise,' to testify as a witness therein. The Act further provides 'that the failure of the party defendant to make such request and to testify in his own behalf shall not create any presumption against him.'"

"This provision," continues Judge Lurton, "is in accord with the Bill of Rights, wherein it is provided that in all criminal prosecutions the defendant 'shall not be compelled to give evidence against himself.'" (The learned Judge is quoting from the Bill of Rights of the Tennessee constitution, which in place of the words of the Federal Constitution "be a witness" uses the words "give evidence.") He proceeds:

> "No inference of guilt can be drawn from the failure of a defendant to testify for himself. Were it otherwise, a defendant on trial might be put in the

> awful situation of being required to commit perjury to avoid the consequences of his failure to avail himself of the privilege extended him by the statute. The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself. The Circuit Judge should have promptly interfered and checked any line of argument based upon the failure of Staples to testify."

We submit that the trial judge in the case at bar should have checked himself from considering defendant's silence to his prejudice, and in so considering that silence he violated one of the safeguards which the spirit of our Constitution and the letter of our laws throws around every defendant in a criminal case.

One of the cases cited by Judge Lurton in the Staples case (*supra*) is a case from Missouri (State *vs.* Brownfield, 15 Mo. Appeal, 593). In that case the words

> "If the defendant is the innocent man those gentlemen would have you think he is, why did they not put him upon the stand to testify?"

used by the prosecuting attorney in his argument to the jury were held to be ground for a reversal of the judgment of conviction, though the court rebuked the attorney and the attorney apologized at the time.

The Missouri statute here construed is Section 1949 of the Revised Statutes of Missouri of 1879. It reads as follows:

> "If the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place."

Section 58 of General Military Order No. 58 (*supra*), like the Missouri laws, makes a wife competent but not compellable to testify for her husband.

Suppose the trial court in this case, instead of saying as it did "on the other hand," &c., had said:

> "On the other hand defendant's wife did not testify in his favor."

The latter is no less utterly irrelevant than the former remark. That the trial court considered this circumstance as a material one is an obvious and a stubborn fact which the counsel for the government in this case cannot escape. We submit that it was irrelevant and that the admission—or, if the court please, the consideration—of evidence as being material which is in fact irrelevant and inadmissible constitutes reversible error and calls for a new trial.

Another of the cases cited by Judge Lurton in the Staples case is Commonwealth *vs.* Scott, 123 Mass. 239. There Chief Justice Gray points out far more forcibly than we could ever have been able to do the logical unity of laws which are constitutional and laws which are merely statutory intended to secure the right of the defendant not to be compelled to be a witness against himself.

He says in part as follows (pages 240-1):

> "* * * the constitution of the Commonwealth declares that no subject shall be compelled to accuse or furnish evidence against himself. Declaration of Rights, Article 12. The statutes allowing persons charged with the commission of crimes or offenses to testify in their own behalf were passed for their benefit and protection, and clearly recognized their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them. (Citing the statutes.) And this court has decided that such silence cannot be taken into consideration by the jury in determining whether the defendant is or is not guilty, and that an equivocal instruction upon this matter entitles the defendant to a

> new trial: Chief Justice Chapman saying 'it is important that the court shall carefully guard his constitutional right.' Commonwealth *vs.* Harlow, 110 Mass., 411."

Chief Justice Gray speaks (page 211) of—

> "The absolute exemption secured to the defendant by the constitution and laws, from being compelled to testify and from having their omission to do so used in any way to their detriment."

We submit that all the safeguards of the Bill of Rights, except the right of jury trial and the right of bearing arms, have been extended by us to the Philippine people, including an "absolute exemption * * * from being compelled to testify * * * and from having their omission to do so used in any way to their detriment."

We also respectfully submit that the failure, for reasons which the Congress in its wisdom has deemed sufficient, to extend them the right to a jury trial, the very fact that we give our trial judges jurisdiction over life and death without a jury, requires that the constitutional guarantees we have extended them and the power of the judges set over them should be construed "according to the most straitest sect of our (constitutional) religion."

Every decision of a court is an argument in favor of the conclusion arrived at. The language of the trial court quoted hereinbefore from the record is an argument based upon the failure of a defendant to testify within the meaning of the language of Judge Lurton in Staples *vs.* State, 89 Tenn., 233-4:

> "An argument based upon the failure of a defendant to testify cannot but be most prejudicial to the defendant."

The Georgia statute (Penal Code of 1895, Section 1010) provides that a defendant may make such statement in the

case as he may deem proper in his own defense, and it shall have such force only as the jury may think proper to give it.

In Byrd *vs.* State, 50 Georgia, 589, the defendant did not make any statement, and the trial court charged the jury that—

> "They might take into consideration the fact that defendant failed to make a statement, and to give to that such weight as they might see fit, and if upon the whole, they should so find, otherwise not."

Error was assigned upon this charge and on appeal the Supreme Court of Georgia said:

> "Was this charge correct? Does it not directly imply that the failure of defendant to make a statement is in some way evidence against him and that the failure may be considered by the jury, *with the other evidence*, to determine his guilt? * * * It would be terrible if what a defendant said in his behalf could not practically count much for him, certainly not as much as other evidence—and yet a failure to say something should count as evidence against him, to be considered by the jury with *'the other evidence.'* "

The case was reversed and sent back to the court below for a new trial.

A later Georgia case (Minor *vs.* State, 120 Ga., 490) was likewise reversed because the State's counsel said to the jury in his argument:

> "There sits the man accused of this dreadful crime, and don't even come on the stand to deny it, though his constitutional right allows him to make his statement and deny his guilt."

The California statute (Stats. 1865-6, p. 865) permits defendant to testify in Section 1, and then in Section 2 provides that—

> "Nothing herein contained shall be construed as compelling any person to testify."

The words of the statute are set out in full in 36 Cal., 527, People *vs.* Tyler.

In that case the court says, in regard to Section 2 of the statute just quoted, that it is—

> "But a reenactment by the statute of that provision of our State constitution which says no person 'shall be compelled in any criminal case to be a witness against himself.'"

This will at once be recognized as the exact words of the Fifth Amendment to the Federal Constitution.

As to Section 1 of the California statute, which is substantially the same as the Philippine law in this case permitting defendant to testify, the California court said in People *vs.* Tyler (*supra*), at pages 529-530:

> "At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty, and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if, at the trial, when, for all the purposes of the trial, the burden is on the people to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically, if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt *that might turn the scale* (italics our own) and convict him. In this mode he would indirectly and practically *be deprived of the option which the law gives him*, and of the benefit of the provision of the law and the constitution, which say, in substance, that he shall not be compelled to criminate himself. *If the inference in question could*

be legally drawn the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself."

We confidently believe that the soundness of this doctrine will be affirmed by this honorable court.

If it is sound, the trial court, erred in summing up the case in that, after dealing with the evidence for the government, it turned to the evidence for the defendant and considered three things:

1. Paucity of proof in behalf of defendant.
2. His failure to testify.
3. Lack of eye-witnesses to contradict the government's eye-witnesses.

Referring to the above table, how much did number 1 weigh with the trial judge? How much No. 2? How much No. 3?

We submit that it makes no difference what the relative weight of the three was with the trial court, because, from his point of view, as set forth in his decision, defendant's failure to testify was, to quote from the case in 36 California (*supra*), "at least to the extent of the weight given by the jury (judge here) to the inference arising from his declining to testify, a crimination of himself."

The California opinion then goes on to say:

> "* * * We are satisfied that the defendant * * * is entitled to rest in silence and security upon his plea of not guilty and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify in his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute. * * *"

Turning now from the law of Mr. Justice McKenna's State to the law of the State of his Honor the Chief Justice of this court, we find the rule to be in substance the same.

The Illinois statute on this subject of his right of silence says:

> "His neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."
>
> See Watt *vs.* People, 126 Ill., 31.

In the case of Quinn *vs.* People, 123 Ill., 333, 346, the trial court was reversed because the government's counsel commented in his argument on defendant's neglect to testify and the opinion cites approvingly three prior cases, "the only ones we have been able to find where the subject has been before us." They then go on to state that these three "were all reversed for a violation of a provision of the statute."

Under Illinois law the case at bar will not stand for a moment. In one of the three cases cited in the opinion of the court in the Quinn case (*supra*), they say:

> "The statute has, in unmistakable terms, declared, in effect, the omission of the accused to testify shall not be used to his prejudice or taken as an evidence of guilt, and in such case *the court and counsel should studiously avoid all allusions to the subject.*"
>
> Baker *vs.* People, 105 Ill., 458.

The Iowa statute on this subject (see State *vs.* Ryan, 70 Iowa, 156) provides that if the defendant elect not to testify that fact shall not have any weight against him on the trial; nor shall the attorney for the State, "during the trial, refer to the fact that the defendant did not testify in his own behalf; * * * and the defendant for that cause alone, shall be entitled to a new trial."

In State *vs.* Graham, 62 Iowa, 111, they say—

> "Courts should hold district attorneys to a strict observance of their duty in this respect"

and reverse the case for violation of this rule.

The Kansas statute provides that

> "The neglect or refusal * * * to testify * * * shall not raise any presumption of guilt, nor shall the circumstance be referred to by any attorney prosecuting the case." See State *vs.* Mosley, 31 Kansas, 357.

The Maine statute of 1879 provides that

> "the fact that the defendant * * * does not testify in his own behalf shall not be evidence of his guilt." (Rev. Stat., c. 134, § 19.)

In construing this law the Supreme Court of Maine say in State *vs.* Banks, 78 Me., 492:

> "We think the intent of the statute is that the jury, in determining their verdict, shall *entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness.*"

citing the Massachusetts case wherein Chief Justice Gray rendered the opinion from which we have already quoted above (Commonwealth *vs.* Scott, 123 Mass., 241).

It is curious to observe how gravely our various State courts at first questioned the wisdom of legislation permitting defendants to testify at all. Of course such legislation invariably provided, in more or less detail, that defendant's failure to testify should not be taken against him. But the idea seemed to be that even if defendant were permitted to testify in his own behalf the jury would not believe him if

he did, and would think him guilty (because secretive) if he didn't. Says the opinion in 78 Me., 491-2 (*supra*):

> "In 1864, for the first time, a person charged with the commission of a criminal offense, was made, 'at his own request and not otherwise, a competent witness.' * * * After this statute took effect, county attorneys, where the accused did not elect to testify, were allowed in argument to comment on the fact to the jury. * * * This practice continued for 15 years; and while it operated favorably for innocent persons, it resulted disastrously to the guilty, who would not add perjury to the crime charged. Thereupon, the legislature, believing that the constitutional provision which declares that 'the accused shall not be compelled to furnish or give evidence against himself' * * * like the rain descended upon the innocent and guilty alike, and looking to a more careful protection of this right, enacted that the fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be evidence of his guilt."

And they therefore hold that the intent of the later statute (1879) was that the jury must "entirely exclude from their consideration" defendant's failure to testify, "substantially as if the law did not allow him to be a witness;" in other words "substantially as if" the old common law, under which defendant was disqualified, by reason of his interest in the case, and therefore incompetent to testify, were still in force.

The Maine statute of 1864 is the earliest one we have found making a defendant competent to testify in his own favor.

The Maine justice who rendered the opinion in this Banks case (*supra*) was on new juridical ground. Evidently the doctrine of the right of silence had not then developed to the point where it was within the bounds of belief that a man might be innocent and yet not go on the stand as a witness in his own behalf, as was later so freely recognized by this court in Wilson *vs.* U. S., 149 U. S., 66 (*supra*).

The Maine jurist seems unable to take the broader view. He evidently considers silence a circumstance tending to show guilt, as did the Philippine trial judge in the case at bar.

Referring to the words of the Federal Fifth Amendment, which exempts an accused person from being compelled to be a witness against himself, he says, in a tone of cynical tolerance concerning the Maine Act of 1879 (which he must recognize and enforce, though he clearly deems it ill-advised):

> "The legislature, believing that the constitutional provision * * *, like the rain, descended upon the innocent and guilty alike, and looking to a more careful protection of the right, enacted," and etc.—

enacted that defendant's silence should not be evidence of his guilt. To this day we may find men by the hundred, on the bench or in the jury box, who are mentally, or at least temperamentally, incapable of excluding from consideration the failure of the defendant to testify; who are utterly unable to refrain from taking that as a circumstance against him; who believe that, statute or no statute to the contrary, defendant's failure to testify is a proper matter to be taken into consideration in determining the question of his guilt or innocence.

Indeed, we find eminent judges here and there who agree with them in this view. Said the Supreme Court of Maine in 1871, State *vs.* Cleaves, 59 Me., 301:

> "It has been urged that this view of the law places the prisoner in an embarrassing condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such

> a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."

Was there ever a more palpable *non sequitur?* Under such a decision, what earthly good could a statute permitting a defendant to testify if he wanted to do?

The Maine statute of 1864 amended the common law by permitting defendant to testify if he wanted to, but failed to protect his right of silence in case he did not want to. So that when this decision in 59 Me. was handed down in 1871, the defendant was far worse off than when he was absolutely disqualified from testifying in his own behalf. The Act of 1864 was intended to help the defendant, but after the decision of 1871 the last state of defendant was worse than the first. So that finally, in 1879, the Maine legislature supplemented the Act of 1864, permitting defendant to testify by providing that if he did not choose to do so it should not be taken against him.

Most of the States have since passed a similar law "looking to a more careful protection of the right" of silence guaranteed by the constitutional provision on that subject contained in the Fifth Amendment and repeated in the State constitutions. It is too late to question the wisdom of such laws. But there still exist many able and upright men, such as the Maine jurists aforesaid and the Philippine judge who tried this case, who can look at such matters only from the one point of view,

"If he didn't do it, why don't he deny it?"

Take by way of further illustration the utterance of a New York judge made in 1889, before the doctrine of the right of silence had reached its present humane state of development. With regard to the provision of the New York Code of Criminal Procedure, that defendant's "neglect or

refusal to testify does not create any presumption against him," the court said:

> "This statutory declaration is not in accord with experience" (People *vs.* Rose, 52 Hun., N. Y., 29).

The only safe rule therefore is the one adopted by the opinion in 78 Me. (*supra*) construing the Act of 1879, viz., to "entirely exclude from consideration" defendant's failure to testify "*substantially as if the law did not allow him to be a witness.*"

The Mississippi statute provides that—

> "the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel."

Under this law, where the prosecuting attorney, referring to an alleged admission made by defendant to one of the State's witnesses said: "And he has not denied it," this was held to be ground for a new trial (Reddick *vs.* State of Miss., Jan'y 7, 1895, 16 So. Rep., 490).

The Mississippi court clearly considers that such comment calls, unconditionally and imperatively, for a new trial (Eubanks *vs.* State, 7 So. Rep., 462, May 12, 1890).

> "Counsel may not even call the attention of the jury to the fact" (of defendant's failure to testify) (Yarborough *vs.* State, 70 Miss., 593).

The Rhode Island statute as to testimony by a defendant in a criminal case provides that—

> "neglect or refusal so to testify shall create no presumption nor be used in argument against him."

Our Philippine statute having provided that such neglect or refusal shall not "in any manner * * * be used against him," we submit that this includes "used in argument," even though the argument be that given by the court

in elucidation of the various facts and circumstances which led him to the conclusion announced in his verdict.

The South Carolina constitution contains the usual reproduction of the part of the Fifth Amendment with which this case is concerned, in these words:

> "No person shall be compelled to accuse or furnish evidence against himself;" and the State statute in amplification thereof adds that defendant shall be allowed to testify if he desires to do so and not otherwise.

In State *vs.* Howard, 35 S. C., 203, the court says:

> "To our minds, these 2 provisions, one of our constitution, and the other of our statute law, look to an absolute freedom of defendant in all criminal cases, as to testifying." * * * "It almost of necessity follows that nothing shall result to his prejudice from a failure to testify."

The Texas statute provides that defendant's failure to testify "shall not be *taken as a circumstance against him*, nor be alluded to or commented on by counsel" (Tex. Gen'l Laws, 1887, p. 37).

We have examined the laws of these various States on this subject so as to determine what the American lawyers in the Philippines, in drawing General Order 58, meant by the words

> "shall not *in any manner prejudice* the defendant, or be *used against him*."

If the failure to testify "be taken *as a circumstance against* him," to borrow the words of the Texas statute, then it has been "used against him," to borrow the words of the Philippine statute.

Tested by the decisions of the several State courts of the United States, read in the light of their several statutes, the right of silence guaranteed to this defendant by the Fifth Amendment has beyond all peradventure been disregarded.

The Texas courts hold that—

> "Allusions * * * to the fact that defendant has not testified * * * will be ground for reversing a conviction, etc." (Brazell *vs.* State, May 9, 1894, 26 S. W. R., 723).

See also Reed *vs.* State, 29 Tex. Ct. App., 452; Johnson *vs.* State, Tex. Crim. Reports, vol. 31, p. 464. Referring to a defendant's failure to testify they say:

> "Any allusion to such failure by counsel is strictly prohibited, and will be reversible error. * * * Absolute silence in the argument as to such failure is enjoined by the statute" (Jordan *vs.* State, 29 Tex., 595).

Should this Honorable Court reverse this case and send it back for another trial, as we believe it will, if on a second trial defendant offered himself as a witness, it would be error even then to allude to his failure to testify on his first trial, if the reasoning of the Texas courts is correct. (See Richardson *vs.* State, June 20, 1894, 27 S. W., 139.)

The West Virginia statute provides that defendant's failure to testify

> "shall not create any presumption against him or her, nor shall any reference be made to nor comment upon such failure by any one during the trial in hearing of the jury."

This has been construed very liberally in favor of the State government and strictly against the rights of the defendant by the West Virginia courts. With them a violation of the statute is not of itself error absolutely demanding new trial, as in many states having statutes almost in the same words, *e. g.*, Texas (*supra*).

They hold that improper remarks of counsel for the Government before the jury on this subject are curable by proper instructions from the court to the jury, instructions sufficient

to prevent them from taking defendant's failure to testify as a circumstance against him. (See State *vs.* Chisnell, 36 W. Va., 659.) But when the judge is also the jury, as in this case, and he on his own showing did take defendant's failure to testify as a circumstance against him, how obviously fatal is the error, how plainly violative of the right of silence guaranteed by the Fifth Amendment to the Federal Constitution!

The Wisconsin statute (Rev. Stat., § 4071) provides that defendant's failure to testify "shall create no presumption against him."

Wharton's Criminal Evidence, in urging the courts to hold firmly to the position that no inference shall be drawn against defendant because of failure to testify, very forcibly puts it thus:

> "Otherwise, exposing himself to this ordeal will become obligatory and there will be a practical abrogation of the great constitutional and juridical principle that no man is to be compelled to criminate himself" (Wharton Cr. Ev., § 435).

Third Assignment of Error.

The doctrine that to establish the guilt of a defendant the evidence must exclude every other reasonable hypothesis is so well settled as to need no citation of authority or comment.

Respectfully submitted,

JAMES H. BLOUNT.
Attorney for Plaintiff in Error.

HENRY E. DAVIS.
Of Counsel.

[redacted]

No. 53.

In the Supreme Court of the United States.

October Term, 1899.

C. M. PENDLETON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

C. M. PENDLETON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 53.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

ARGUMENT.

The points in this case regarded as of chief importance by the other side seem to be those stated upon page 29 of the transcript of record—

That there should be found error:

1. Because the accused was compelled to be a witness against himself, in violation of article 5, act of Congress of July 1, 1902.

2. Because his not taking the witness stand "has been used to his prejudice," in violation of his right to remain silent until his guilt should be established beyond a reasonable doubt.

3. Because the evidence did not show his guilt beyond a reasonable doubt.

The brief of appellant shows a considerable shifting of position as to No. 1. The chief trouble now is, it seems, that the prosecuting attorney examined the defendant for his own purposes before there was any "case" and just after the homicide occurred. How this can now be remedied is not made clear, and no authority for such a theory is claimed among the many cited.

NEW AND ABNORMAL SYSTEM OF PROCEDURE.

These propositions can not intelligently be discussed aside from a peculiar and wholly unprecedented system of law and procedure recently established for the lower courts and for appeals in Philippine cases.

Propositions 1 and 2, obviously, might involve one set of considerations from the view point of an ordinary trial here, where there is a jury, but quite another set where only the first instance court judge and the court of appeals weigh the evidence, and there is an appeal instead of a writ of error from the one to the other.

So, also, proposition 3 as a point on appeal involves considerations outside of the familiar domain of American criminal law.

Is this court, in another hemisphere, to weigh the evidence for the *third* time, and decide that it does or did or should leave, or should have left, room for doubt about the defendant's guilt ?

Is "reasonable doubt" in the law an independent thing to be properly spoken of aside from the state of mind of the trial court or jury, or does it suffice *that that tribunal* shall be *convinced* beyond a reasonable doubt?

The first thing to attempt is to get our general bearings in a somewhat novel and unusual situation.

NO JURY TO BE PROTECTED FROM BEING INFLUENCED.

The organic act of Congress, if it may be so called, has given the Philippines a bill of rights, but not the jury system, and the old civil-law plan of an instance court investigation, with the real trial in the upper court, was not retained, but the law gives an appeal to the Philippine Supreme Court. From this higher civil-law court appeal or error lies to this court in Washington, with power to affirm, reverse, modify, etc., the decisions of the Philippine Supreme Court.

Only the most fundamental questions concerning this system have been passed upon by this court, and those largely upon a division of opinions.

However, those decisions have made or left it clear that we still have the court of first instance and decision by a judge without jury; that that court's action is (in view of a military order) a *finality* unless appealed from, instead of a mere *preparatory* inquiry, as under Spanish law; that after a trial in the first court, a right of appeal exists in case of conviction, that is, only on behalf of the defendant; and that the appeal carries the whole case and the appellate Philippine court considers the whole record

and can substitute a judgment of its own for that of the lower court.

The military order referred to (No. 58) provides, among other things, under the head of "Rights of the accused at trial," that "in all criminal prosecutions the defendant shall be entitled—

> "3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.
>
> "4. To be exempt from testifying against himself."

THESE TWO MILITARY PARAGRAPHS SUPERSEDED BY CONGRESSIONAL BILL OF RIGHTS.

Whether this part of the order is now in force may well be doubted, in view of section 5 of the act of Congress of 1902, which takes up the matter of "*the rights of the accused at trial*" and apparently undertakes to cover the same ground and the whole of it. Ordinarily such action works a repeal of the prior law on the subject and all parts of it covering that same ground, whether in conflict or not with the new law, and even though no provision is made for some details mentioned in the old law.

In favor of the view that this part of the order was actually intended to be superseded, it might be suggested that Congress would naturally think it preferable to use or adopt the constitutional Bill of Rights rather than the ideas of a military order, and

that accordingly "no person shall be compelled in any criminal case to be a witness against himself" of the Constitution was intended to be substituted for "the accused shall be entitled to be exempt from testifying against himself;" and as to paragraph 3 above quoted, Congress may well have recognized the first part (giving the accused a right to testify) as being unnecessary, in view of the local law and practice, which did not emanate from the provisions of the military order, and the latter part as inappropriate and inadequate, in view of the absence of the *jury* from the system of procedure. It must have been obvious to Congress that this last provision, if not inappropriate, was inadequate to accomplish the object its author seems to have had in view, having been borrowed from a system in which it is useful and practicable to exclude from the *jury* of ordinary *laymen*, who might not know that the accused has a right to testify, a certain argument against the accused from his failure to testify—a system in which, moreover, if the argument is *not* excluded, an independent authority can set aside the verdict and bring about a *new* trial before another *like jury*. But in this military system the trial is by the court, which does know the right of the accused, and, too, if the argument is made to the court and has any effect in prejudicing the mind of the court, there is no way of trying the case again in that court, except before the same prejudiced judge.

In other words, in our American system there is a bringing in of new minds by which the argument *has*

never been heard and by which the accused's right to testify is unknown or unappreciated. In the Philippines the same judge with the same mind would be there at the two trials, if a new trial should be ordered. In view of all this it is probable that Congress really meant to abandon paragraphs 3 and 4 of the order above quoted, and leave the "Rights of the accused at trial" to the Bill of Rights Congress borrowed from the Constitution.

We submit that appellant's brief demonstrates that section 3 of the military order was dependent on and perished with the superseded section 4: "to be exempt from testifying against himself." The brief shows how absolutely dependent upon the jury system and how inseparable from the right to abstain from self-incrimination the laws safe-guarding the so-called "right of silence" are. Congress saw the inappropriateness of the military scheme and eliminated it. Certainly, it would be grotesque to expect a judge learned in the law not to have his belief affected by something he can not help knowing. We doubt that Congress would conceive such a scheme, whatever a soldier might do. Belief is involuntary, and an effort not to consider a thing known would itself become a consideration of it. So far, however, as the mind could succeed in such an effort, it would be helped by deliberately writing down what was and was not in the case and to be or not considered in reaching conclusions, if that is what was done in this case.

IF THE MILITARY LAW IN FORCE AND VIOLATED, THEN THE TRIAL ON APPEAL WAS TO CORRECT THE MATTER.

Supposing, however, that this part of the military order remained in force during the trial here in question, we submit that in case of a violation of it in the court of first instance (where alone testimony is introduced, whether given by the accused or others) the order could not have been intended to have any further effect than to operate on the mind of the appellate court. That appellate court would have all of the evidence and try the case *de novo* (*Trono* v. *United States*, 199 U. S., 521), and in so doing could eliminate any evil produced by the wrongdoing of the lower court in compelling the testimony or in being prejudiced by a failure to testify. In our case we have the assurance of the higher court, and there is nothing, as we claim, to show the contrary, that its conclusions were reached without being in any manner prejudiced by the neglect or refusal of the defendant to be a witness and without "using" that against him.

Here was another and independent trial, a new trial, intended by the order to correct any erroneous proceedings of any kind in the other trial. See *Trono* v. *United States*, 199 U. S., 521. The accused was fairly tried *de novo*, and, if we accept the assurance of the upper court, as we think should be done, the accused has been convicted fairly and properly by the upper court, notwithstanding any prejudice the lower court

may have had because he did not testify. He is not entitled to *two* fair *convictions* because the lower court erred. The two *trials*, instead of one, he has already had, are no part of the Spanish plan or of any *other plan* outside of the military order referred to; and the order failed to provide in any way for the supposed wrong, except by allowing an upper court to correct it in reaching its own decision. He has had a "new trial."

Appellant's brief seems to rely upon an error not assigned, and on an inference not warranted—that there should have been a new trial in the lower court, because the upper court did not see the witnesses and confront the accused with them. The argument may be well enough as showing what the military plan might have been. The possibly illogical and inconsistent meanings of this order of a soldier can not be made other than they are or were by this line of argument, nor is a bill of rights, so called, when a mere law of Congress, any higher or more controlling than any other law of Congress or military order adopted by Congress. And this one, so far as not repealed or superseded, was adopted by Congress. But the accused had been confronted with the witnesses and their testimony written down and treated as depositions. The right to cross-examine has been given, and it is the accused, rather than the court, that must be confronted. The letter and spirit of that right to be confronted were fully complied with, and certainly as much so as in any other cases tried and appealed according to this novel system. See *In re Ross*, 140

U. S., 453, a very enlightening case concerning a trial without jury under a *quasi* bill of rights by a consular court.

THE LOWER COURT IS NOT SHOWN TO HAVE BEEN PREJUDICED AS SUPPOSED.

But although the upper court remarks (R., p. 26) "that the fact that defendant declined or failed to testify as a witness was taken into consideration by the court of first instance"—that is, was mentioned in its decision—we think we are entitled to contend here upon *the same record* that the lower court did not permit the neglect or refusal of the witness to "*prejudice*" the defendant or "*use*" it against him in any manner. We do not understand the higher court to affirm that the taking "into consideration" by the lower court injured the defendant with the lower court; but if that is what is meant by the higher court, what the lower court really did is here to speak for itself. Keeping in mind that there was no jury to be influenced by any arguments or comments of the court or attorneys, we do not see that the mere mention by the lower court of *an obvious fact*, namely, that the accused did not testify, proves that this fact affected the court's decision or constitutes "using" this fact against him in the sense in which that using is intended to be forbidden. The law and fact were known to the court, whether spoken of or not.

WHAT THE LOWER COURT MENTIONED WAS TRUE AND UNAVOIDABLY OBVIOUS WHETHER MENTIONED OR NOT.

We understand that the argument intended to be excluded from the *jury*, in our American courts, is that the man is guilty and for that reason has avoided taking the witness stand. Doubtless that same argument or inference is what the military commander sought to have avoided. Perhaps he had no very clear idea of such things, being a soldier, not a lawyer. But all that the lower court stated was known and obvious to that court—*unavoidably so*. If before appearing in public to announce its decision the court deduced any conclusion from the fact referred to, we can not know that, except from what it later said in public; and it does not appear from its statements that the court inferred any *guilt* from the fact of the defendant's not taking the witness stand. What the court said is this:

OVERWHELMING DIRECT PROOF ON ONE SIDE—MERE CRITICISM AND OPINIONS ON THE OTHER.

> The prosecution has presented *an abundance* of proof which, in case the court should give it *full credence*, would establish the guilt of the accused *beyond all reasonable doubt*. On the other hand, the defense has presented *very little proof;* the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably for him. The defense has *practically limited itself* to insisting on (1) alleged contradictions between the various

witnesses of the prosecution relating to the details of identical facts or happenings related to them; (2) mistakes which they claim to be essential in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case; (3) the expert testimony of two physicians.

Obviously, the word "proof" is used, as it often is, for testimony.

Nothing could be plainer than the ideas intended to be expressed by the court, as it seems to us. The court is discussing relative *amount* of direct and other testimony presented by the two sides, and remarks that "the defendant has presented very little proof" and none by an "eyewitness," and that *its case stands* on the three things mentioned and numbered. We understand the court to say that the defense had presented *no direct proof*, and to refer to the defendant in that connection only by way of saying that neither he nor anyone had furnished any such direct proof or proof of an "eyewitness." There being *no direct proof put in, the court says so*, in order to come clearly to the evidence that *was* put in and was to be the basis and only basis of all its conclusions.

It is customary in civil law courts, in announcing to the public what has been previously decided, to make a formal statement in this way of what written testimony is in the record before proceeding to give the formally stated conclusions of fact therefrom. Unless this is kept in mind a mere

description of the state of the record may be mistaken for a part of the court's deductions. Of course, this court is familiar with civil law style and conceptions.

On the one side, abundant direct testimony; on the other, two experts and reliance upon contradictions and "inconsistencies" in the government testimony. Abundant direct *testimony* (if we "should give it full credence"), and the other side "limited" to criticism of that side—flaws—contradictions in its direct and abundant testimony, and some expert opinions. We submit that there is nothing in this mere statement of known and obvious facts, explanatory of what is and is not in evidence, which proves a violation either of the letter or the spirit of the prohibition in question. And we insist upon this the more because the court very explicitly tells us what did influence its mind about things, and on closely considering what it says, it is clear that the court was not influenced at all by the absence of the accused from the witness stand. The *direct* evidence was clear and full to the point that the accused was shamefully drunk, and the court recognizes this fact as an *extenuating circumstance*. For aught that appears in reading the judgment of the court, it may have thought (what the attorney for the accused voluntarily announced later to be a fact) that the accused was too drunk to remember what had occurred, so as to be able to be a witness. That he refrained because he was *conscious of guilt* can not possibly be inferred from the remarks of the court just quoted.

ALL THIS APPLIES TO THE SUPPOSED VIOLATION OF THE MILITARY ORDER BY THE HIGHER COURT.

Turning now to the higher court, also supposed to have violated the military order, if we disregard its assurance to the contrary and look at its opinion, we find only the following language:

> As to subsequent occurrences *we have not the benefit* of his recollection and must *rely on* the testimony of the witnesses for the prosecution and the circumstances of the case.

"Must rely" for all purposes of defense and prosecution, guilt or innocence, that is, on the witnesses and circumstances mentioned.

Is a judge, learned in the law, forbidden to allude to depositions in this way? Can he not mention what is self-evident? He is not stating his process of reasoning, which is mental and not on paper—thought, not words. He is not (being a civil law judge) trying to state merely his own deductions, but formally summarizing the written evidence and the record, preparatory to stating in set form his conclusions from what the record contains to "rely on."

We do not see in this any indication that the failure to testify was treated as raising any presumption of guilt. It is not a comment made to a jury which, either intentionally or otherwise, calls its attention to the right to testify and a refusal to testify, in such a way as might suggest the inference of guilt from these things. The court knew—there was no way to avoid knowing—that defendant could testify and had not testified. In a paragraph the

higher court merely states, in effect, this unavoidably known fact that he had not testified.

We confess we see no more than this in the lower court's remark—no more than this same mention of an unavoidably known fact, in enumerating the items of evidence put in or not put in the case—a statement made merely with a view to saying this is what the evidence on both sides consists of and to get down to the business of announcing a decision—a decision reached in the judge's mind, perhaps long before, by considering and weighing what *had* been put in.

NOT PART OF OUR FAMOUS AND REVERED CONSTITUTIONAL BILL OF RIGHTS.

The competency of an accused to testify, and accompanying rules, are no part of our bill of rights, so called, and were not included in the President's order of April 7, 1900, or in the act of Congress of July 1, 1902, both of which set forth in detail *a* bill of rights for the Philippines, both borrowed manifestly from our Constitution.

The military commander's provisions were doubtless suggested by nothing more sacred than an act of Congress of March 16, 1878, entitled "An act to make persons charged with crimes and offenses competent witnesses in the United States and territorial courts." In that law it was enacted that "the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

COMPELLING THE ACCUSED TO TESTIFY AGAINST HIMSELF.

The next proposition (quite the opposite to the first) is that defendant *was compelled to testify against himself*, by being compelled, through his counsel, to say that he was too drunk to remember what did occur at the time of the homicide.

There is no indication that his being too drunk to remember the facts operated against him. It seems to have operated for him, whether we regard his drunkenness as proven *wholly by* others (and it was by them proven beyond a doubt), or partly inferred from the remark of his counsel. That he was drunk enough to be in a fit condition to commit any crime or folly was proven beyond a doubt without any such remark. To *go* further and say he was *too* drunk to know or remember could only help him, and if he was forced to say this, he was merely forced to benefit himself.

NO REAL TESTIMONY, NO REAL COMPULSION, NOT REALLY AGAINST HIMSELF, IF COMPELLED.

It is not claimed that the accused really gave any testimony in the case; but the so-called testimony against himself relied upon is the statement (R., p. 25) of his counsel in the higher court that "he did not go on the witness stand because he did not remember anything about the occurrence;" which circumstance is said to have been discussed by the

upper court as a fact prejudicial to the defendant, in the following words (R. 19):

> The defendant, a lieutenant of constabulary, in command at the Parian Barracks at Cebu, being intoxicated, borrowed a carromata, which was without lights, from a friend and was found wandering about the streets there by a municipal policeman named Almonte, who, at his request, drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and *must rely* on the testimony of the witnesses for the prosecution and the circumstances of the case.

WHAT MUST BE SHOWN TO MAKE OUT A CASE.

On this point, what the accused must from the record show is, first, that, in fact, his counsel made the alleged remark; that it was in reality testimony against him on the issue; that it was in some way testimony by him; that he was compelled to give it, within the meaning of the Philippine bill of rights; and that it has materially injured his case. But all this would go along with the emphatic statement of the court, which was also the jury, that it "*must rely* on the testimony of the witnesses for the prosecution." "Must rely" does not mean must rely for conviction, but must rely as a basis of decision. The court must rely on what it has and states what it has to rely on.

Having shown all this, the question will remain, what should be the consequence of the violation of his rights not corrected by the local courts; that is, should there be a correction here by a new decision

unprejudiced by this testimony of his, or what other course should be pursued?

We do not find anything in the record to show that any such remark of counsel *was made*. It does not appear that the *accused* told his counsel either to make the remark or *that he had* in fact been too drunk to remember. What the counsel is alleged to have said and who told him are certainly not proven by the quotation from the court's remark that accused was intoxicated or its remark, "as to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case."

Those statements could very well have been made, aside from any such supposed remark of counsel. That accused was drunk was testified to by the witnesses, and that the court "had not the benefit of his recollection" was an obvious fact which his merely not testifying sufficed to produce.

We submit that, for a newly appointed attorney to recite in a motion for a new trial that a former attorney made a remark in court, and did so for a certain reason, can not establish either of those two facts, for the purposes of this appeal. But we have here absolutely nothing else to establish either.

Conceding, however, for the sake of argument only, that the remark was made, there is nothing to connect the making it with the quotation from the brief of the fiscal about the failure of the accused to testify (R., p. 25), which quoted passage is supposed to be the

means employed for *compelling* the self-accusing testimony, so called.

It seems to be merely an argumentative inference of the new attorney that the one thing "compelled" the other. It is certainly not a necessary or obvious inference. To get leniently treated in reaching conclusions and mercifully treated as to punishment would be motive enough for claiming such intoxication. Certainly these are far more natural inferences.

Brief or no brief, the fact of not testifying was plain, and some explanation of it might, at any stage of the proceedings, have been deemed useful by defendant's counsel. Especially, having failed to explain at all in the lower court and there lost the case, they may have deemed it wise to experiment with the other course in the other court. This seems to be an afterthought by a zealous lawyer, who hoped to accomplish better results than his predecessor.

NO PROOF OF FACTS CONSTITUTING SUPPOSED COMPULSION; BUT IF PROVEN, WHAT THEN?

In view of the failure to show more facts about this alleged violation of the right of accused not to be compelled to testify against himself, it would seem superfluous to do more than suggest the questions of law that would arise if all the facts were properly established.

Such a sort of compulsion is not within the meaning of the Philippine bill of rights—to have an attorney's argument in his brief bring the accused

or his counsel to believe that it was wise to announce that he had been too drunk to remember what happened.

This so-called testimony could easily have been avoided. It was *purely voluntary*, since the attorney could have called the court's attention to the supposed improper remark in the fiscal's brief, and warned the court against *itself* violating the law. It would have been as easy and as natural to call that high court's attention, by way of warning, as it was to take chances and later try to make a point of this pretended compulsion.

Parties have no right to omit to demand fair and proper treatment at any stage, and then come here to complain—no right to gamble on what one court will do and then seek from another what they might have obtained for the asking in the lower court.

But conceding that this was *testimony* of the *accused* and that it was *compelled*, yet how is it shown that it was *against* himself?

HOW IS THIS SO-CALLED TESTIMONY AGAINST THE ACCUSED ON THE ISSUE OF ASSASSINATION OR NOT?

The admission or allegation (if made) was made by counsel in the appellate court, after all that is properly testimony was in, after his being "in a shameful state of drunkenness" was established beyond a doubt and the testimony closed; and after this testimony had been passed upon with a result unfavorable to the accused.

If it was against the accused, so far as his reputation for limited intoxication was concerned, can it be doubted that to show that, besides being drunk, as fully proven otherwise, he was *too drunk to remember* what he had done, tended to show that he did not know *at the time* what he was doing, and was morally and equitably irresponsible?

If he was already shown to have been beastly drunk, would not wiping out memory naturally incline the court to the most favorable view? Beastly intoxication, without loss of memory and knowledge, would play as good a part in *causing the supposed crime*, and it seems to us that to go a step further in intoxication could only tend to excuse the defendant and to placate the court—to prejudice it in the accused's favor *on the issue*.

NOT PROVEN BEYOND A REASONABLE DOUBT!

We come now to the proposition that the evidence does not show the guilt of the accused beyond a reasonable doubt. This has no resemblance to the proposition (which could not possibly be suggested in the present case) that there is not sufficient evidence for the case to go to the jury. It seems to be a new or unprecedented proposition, and when made in this court, instead of below, strikes us as preposterous. But assuming that this court is, for some purpose or with some consequence, to consider reasonable doubt, was or is there any such thing here?

It might suffice to say that a perusal of the evidence leaves absolutely no doubt.

The witnesses who were present all testify to the same facts. No motive for falsifying is suggested, nor any ground of suspicion against any other person than the accused. The "experts" and the alleged contradictions amount to nothing. The variations in the stories strengthen one's belief—if of so direct a tale there could be any stronger belief than the plain, unimpeached testimony of eye witnesses having no even alleged motive to falsify produces. The doubt must be unreasonable, artificial, theoretical. No sane mind, we think, can read and not believe as to the main facts.

The story, with the drink included, is in no way improbable in itself.

But, in the absence of any positive law for these particular appeals, we submit that this court's general rule and system concerning facts found by the lower courts ought to be applied, and would prevent the incongruity and absurdity of attempting to treat "reasonable doubt" as something wholly apart from the minds of the *persons to be convinced*.

Surely it is not intended that as to a matter of fact (of which we consider laymen better able to judge than lawyers) a gambling on lower and higher courts is intended beyond the two trials in the Philippines the military authorities prescribed. Congress surely could not consider such a plan as supposed natural.

Efforts to define what kind of a doubt is reasonable have not met with any too great success; but here we have proposed a more abstruse problem, viz, ought

the trial judge or two trial judges to have been convinced beyond a reasonable doubt, as they say they were?

Is that to be solved by experimenting with the minds of the honorable justices of this court?

Or is the problem—is this highest court, sitting in Washington, convinced beyond a reasonable doubt about an act of violence in a Philippine town? The justices of this court with their learning and ability as lawyers are not, according to our Anglo-American notions, as fit as a jury of the vicinage to say whether that deed happened or not.

They did not see the accused or live near the scene, and, unlike the Philippine supreme court, they live halfway around the globe from the alleged occurrences and witnesses—that is, in almost another world, socially and in every way.

But we doubt that this third point will be much insisted upon, in view of the clear and substantially uncontradictory testimony, were there no other reason.

FACTS ARE FOR COURT BELOW.

Finally, we do not understand that in this case, brought here on writ of error, any but a law question can be examined into. Whether the evidence, when there is quite a mass of evidence bearing directly upon the point, proves a fact or not can not be regarded as a law question. That is what juries ordinarily have submitted to their lay minds. It is not a law question. The act conferring jurisdiction of these appeals

expressly provides for a writ of error when appropriate, and it certainly seems to be so in this case. (See *Santos* v. *Roman Catholic Church*, 212 U. S., 464.)

For the reasons stated, the judgment below should be affirmed.

CHARLES W. RUSSELL,
Assistant Attorney-General.

NOVEMBER, 1909.

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PENDLETON *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 53. Argued January 21, 1910.—Decided February 21, 1910.

The retention by the prosecuting authorities, without using it on the trial, of a statement made by the accused, does not amount to compelling him to be a witness against himself within the provisions of Chap. 5 of the Philippine Act of Congress of July 1, 1902, 32 Stat. 691.

The Supreme Court of the Philippine Islands tries a criminal case on the record *de novo*, and if it avoids an error which may have been committed by the Court of First Instance, the judgment will not be reversed by this court on account of such error; and so held in this case in which the Court of First Instance took into consideration the fact that accused did not offer to testify on his own behalf, but the Supreme Court, on the accused's own appeal, declared that it did not take that fact into consideration but rendered its decision on the proofs.

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THE facts are stated in the opinion.

Mr. Henry E. Davis and *Mr. James H. Blount* for plaintiff in error:

The neglect or refusal of accused to be a witness shall not in any manner prejudice or be used against him. Military Order, No. 58, of April 23, 1900, 1 Pub. Laws Phil. Comm., § 15, subsec. 3, p. 1083; *Kepner* v. *United States*, 195 U. S. 112; *Rudoff* v. *The People*, 45 N. Y. 203; *People* v. *Doyle*, 58 Hun (N. Y.), 535; *Wilson* v. *United States*, 149 U. S. 60; *Showalter* v. *State*, 84 Indiana, 562, 566; *Staple* v. *State*, 89 Tennessee, 231; *Commonwealth* v. *Scott*, 123 Massachusetts, 239; *Minor* v. *State*, 120 Georgia, 490; *Quinn* v. *The People*, 123 Illinois, 333, 347; *Dorr* v. *United States*, 195 U. S. 138; *State* v. *Brownfield*, 15 Mo. App. 593; *People* v. *Tyler*, 36

California, 527; *Baker* v. *People*, 105 Illinois, 458; *Watt* v. *People*, 126 Illinois, 31; *State* v. *Ryan*, 76 Iowa, 156; *State* v. *Graham*, 62 Iowa, 111; *State* v. *Mosley*, 31 Kansas, 357; *State* v. *Banks*, 78 Maine, 492; *State* v. *Cleaves*, 59 Maine, 301; *People* v. *Rose*, 52 Hun (N. Y.), 29; *Reddick* v. *State* (Miss.), 16 So. Rep. 490; *Eubanks* v. *State*, 7 So. Rep. 426; *Yarborough* v. *State*, 70 Mississippi, 593; *State* v. *Howard*, 35 S. Car. 203; *Brazell* v. *State*, 29 Tex. Crim. App. 452; *Johnson* v. *State*, 31 Tex. Crim. Rep. 464; *Jordan* v. *State*, 29 Texas, 595; *Richardson* v. *State*, 27 S. W. Rep. 139; *State* v. *Chicell*, 36 W. Va. 659; Wharton's Crim. Ev. 435.

Military Order No. 58 is for the Philippine Islands what the Fifth Amendment is for the United States, and constitutional provisions for security of persons and property must be liberally construed. See *Boyd* v. *United States*, 116 U. S. 616, 635.

The action of the prosecuting attorney in holding on to the affidavit improperly obtained from accused prevented accused from taking the witness stand and was therefore prejudicial to his interests.

Mr. Assistant Attorney General Russell for the United States.

Mr. Justice McKenna delivered the opinion of the court.

Plaintiff in error was convicted of the crime of murder in the Court of First Instance of the Province of Cebu, Philippine Islands, and sentenced to twenty years' imprisonment, which was reduced to seventeen years by the Supreme Court.

The assignments of error are as follows:

"1. The accused has been compelled to be a witness against himself in violation of Article V of the law of Congress of July 1, 1902.

"2. The fact that the accused did not offer himself as a witness in his own favor has been used to his prejudice in violation of his right to remain silent until his guilt be established by the evidence beyond a reasonable doubt.

"3. The evidence does not show the guilt of accused of the crime imputed to him beyond a reasonable doubt."

The argument to support the first assignment of error is not very tangible. It is based upon an affidavit of defendant in error that he was subpœnaed as a witness and obeyed by going to the fiscal's, where he answered questions put to him without knowing that he had a right to refuse or being notified that he had such right, and not knowing that "the object of securing his statement was in order to search for proof against him." The affidavit also states that he was not represented by counsel, and did not know that he had a right to consult a lawyer. Motion was made, presumably based on the affidavit, for an order to the fiscal to return to the defendant the statement, together with all copies of the same, and that the fiscal be prohibited from using the statement in any manner whatever. Nothing seems to have been done with that motion, and subsequently it was repeated and denied on the ground "that it was not a proper time to make such motion, as the court could not then decide on the admissibility of proofs which had not yet been offered in the cause." An exception was entered.

It is not contended that the statement was afterwards used in any way, but the action of the court is urged nevertheless as an error "so grave and so material," to use counsel's words, "as to call for a new trial."

The argument to support it is based on suppositions of what might have been done, and the potency of the statement in the hands of the prosecuting officer. "It left the defendant open, it is said, to the fire of a masked battery." But the law has no measure to apply to such a situation. Defendant was certainly not disabled from telling the truth in other statements if he wished to make them, and to be able not to tell the truth can hardly be urged as a legal and constitutional right. The assignment of error, therefore, is not well taken.

The second assignment of error is that the fact that the

defendant did not offer himself as a witness was used against him. To support this contention certain remarks of the judge of the trial court in delivering sentence upon the defendant are quoted. The court said:

"The prosecution has presented an abundance of proof which, in case the court should give it full credence, would establish the guilt of the accused beyond all reasonable doubt. On the other hand, the defense has presented very little direct proof; the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably to him. The defense has practically limited itself to insisting on: (1) Alleged contradictions between the various witnesses of the prosecution relating to the details of identical facts or happenings related by them. (2) Mistakes which they claim to be essential, in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case. (3) The expert testimony of two physicians that the deceased could not have died as the result of a wound received in the manner stated by the witnesses for the prosecution."

An analysis of this language is made by counsel and its relation to the general character of the evidence is discussed, and the conclusion deduced that the trial court urged three arguments to sustain its judgment: "First, paucity of proof in behalf of the defendant. Second, his failure to testify in his own favor. Third, his failure to get any eyewitness to the shooting, to rebut evidence of the Filipinos who claim to have been eyewitnesses." And to this summary, which, it is urged, demonstrates that the trial court considered in determining the guilt of defendant, that he failed to take the stand in his own behalf, there is added the comment of the Supreme Court of the islands in its review of the case, or rather in denying a motion for a new trial, after its decision of the case. Upon the first consideration of the case in the Supreme Court no assignment of error based on the point was made. It was raised for the first time in what is styled "Exception to the

judgment, and motion for a new trial," in which he excepted to the judgment rendered by the Supreme Court and prayed that it be set aside and a new trial granted him. The reasons given were as follows:

"I. The defendant has been compelled to testify against himself in violation of art. No. 5 of the law of Congress of July 1, 1902, in the following manner:

"The accused, taking advantage of the right conceded him in the third paragraph of article 15 of the General Orders, No. 58, did not testify in the Court of First Instance, and said court in its judgment considered this circumstance as prejudicial to the defendant; and the attorney general adduced the same circumstance in his brief in this court in the following words:

"'No direct proof was presented by the defense to contradict the facts stated by the witnesses for the prosecution; nor did the defendant himself testify in his own favor to deny the grave crime with which he is charged.'

"And to overcome as far as possible the effect of this illegal procedure so prejudicial to the accused, his counsel in this court, speaking in his name, felt himself obliged to state to the court that the defendant did not go on the witness stand because he did not remember anything about the occurrence; which circumstance was considered by the court as a fact prejudicial to the defendant and appellant in the following words:

"'The defendant, a lieutenant of constabulary in command at the Parian Barracks at Cebu, being intoxicated borrowed a carromata, which was without lights, from a friend and was found wandering about the streets therein by a municipal policeman named Almonte, who at his request drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case.'"

To which it was replied:

"The court having heard the petition of Attorney Kincaid, praying for a new trial of case No. 3176, the *United States* v. *Pendleton*, in which a decision was rendered by this court on the ninth of the present month of February, 1907, said, that although the fact that the defendant declined or failed to testify as a witness was taken into consideration by the Court of First Instance, this court, in deciding the cause did not take said fact into consideration, but rendered the decision in accordance with the proofs presented at the trial, and, therefore, the new trial solicited is denied."

Defendant puts aside the disclaimer of the Supreme Court as unimportant in an argument which is certainly difficult to represent if not to follow. He appealed to the Supreme Court to review the judgment of the lower court. He made a motion for a new trial in the Supreme Court, and that being denied, he now urges, not error committed in the Supreme Court, but error committed in the trial court. This is worked out and attempted to be justified by an argument that, it may be, we do not understand. It is said that the Supreme Court misapprehended the "function conferred upon it by Congress and the Philippine Commission in relation to reviewing the decisions of Courts of First Instance." That it seemed to be of opinion that it had "the same authority in this regard as was possessed by its Spanish predecessor, the audiencia," and "passed on the decision of the court below about as a reviewing court would pass on an equity proceeding upon written testimony submitted by affidavits and interrogatory depositions." And by doing so, counsel further urge that the Supreme Court did not have before it what they describe as "the supremely human element—the appearance of the witnesses and their manner on the stand, etc.," and, not having such element, could not judge of the effect of the evidence independently of the silence of the defendant, and could not determine therefore how much the error of the trial court, in considering such silence, controlled its judgment. The answer is that the Supreme Court had the power

to review the case and consider all that was necessary to the exercise of such power. That power was invoked by defendant, and he secured from its exercise a reduction of three years in his sentence. And *Trono* v. *United States*, 199 U. S. 521, may be cited as an answer to the contention. In that case the power of review which the Supreme Court possessed over the judgment of the trial court was exerted to the extent of reversing a judgment and sentence for assault, and rendering a judgment for homicide. *Trono* v. *United States* needs very little comment. It declares the relation of the courts and the scheme of procedure existing in the Philippine Islands and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial in the court of first instance, and which was not repeated in the Supreme Court, is not a ground of legal complaint.

The third assignment of error is not discussed by counsel. It is, however, manifestly without merit.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.